Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM 2001

WILLIAM RENO GERBER,

Petitioner,

v.

RODERICK HICKMAN, WARDEN

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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103 pp

QUESTIONS PRESENTED

The right to procreate is "one of the most basic civil rights of man," is "fundamental to the very existence and survival of the race," and, as such, is "implicit in the concept of ordered liberty." (*Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).) Yet, the Court of Appeals for the Ninth Circuit, in a controversial and widely-discussed bare majority 6-5 en banc opinion, reversing the three judge panel decision, determined on a motion to dismiss that a prison may permanently terminate this most basic right of a prisoner—and of his innocent spouse—*without showing that doing so serves any legitimate governmental interest*. The Ninth Circuit determined the right to procreate *never* survives incarceration, and a life term prisoner cannot send his semen out of the prison for artificial insemination of his wife, even if he can show that it would pose no appreciable burden on the prison. The questions presented by the decision include the following:

1. Did the Court of Appeals for the Ninth Circuit err in holding that the constitutional right to procreate while in prison is inconsistent with incarceration under all circumstances?

2. Did the Ninth Circuit err in holding as a matter of law that a warden's imposition of the gratuitous punitive measure of permanently depriving the right to procreate to life term inmates and their spouses does not violate either the Equal Protection Clause of the Fourteenth Amendment or the Cruel and Unusual Punishment Clause of the Eighth Amendment?

TABLE OF CONTENTS

QUESTIONS PRESENTED ..... *i*
TABLE OF CITED AUTHORITIES ..... *iv*
TABLE OF APPENDICES ..... *x*
PETITION FOR A WRIT OF CERTIORARI 1
CITATIONS OF OPINIONS AND ORDERS 1
STATEMENT OF JURISDICTION 1
CONSTITUTIONAL PROVISIONS INVOLVED 1
STATEMENT OF THE CASE 2
- I. The Underlying Facts 2
- II. Procedural History 3
  - A. Proceedings In The District Court 3
  - B. Proceedings In The Ninth Circuit 5

REASONS FOR GRANTING THE WRIT 6
- I. Certiorari Is Proper, Because The Ninth Circuit's En Banc Majority Decided An Important And Unsettled Question Of Federal Law. 7
- II. Certiorari Is Proper, Because The Ninth Circuit's En Banc Opinion Decided An Important Federal Question In A Way That Conflicts With Relevant Decisions Of This Court. 11
- III. Certiorari Is Proper, Because The Ninth Circuit's En Banc Decision Conflicts With Every Other Published Opinion In The United States Courts Of Appeals On The Same Important Issue Of Whether The Right To Procreate Survives Incarceration. 14
- IV. Certiorari Is Proper, Because The En Banc Opinion Is Wrong, Results In A Gross Miscarriage of Justice, Erodes The Important Constitutional Rights To Marriage And Procreation, And Is Unduly Harsh. 16
  - A. The En Banc Opinion Incorrectly Concludes That The Right To Procreate Is Inconsistent With Incarceration. 17

B. The En Banc Decision Improperly Allows A Warden To Gratuitously Impose The Additional Punishment Of Permanent Deprivation Of The Right To Procreate In Violation Of the Equal Protection Clause And The Eighth Amendment 22
1. *The Denial of Mr. Gerber's Request Violates The Equal Protection Clause* 23
2. *The Denial Of Mr. Gerber's Request Violates Mr. And Mrs. Gerber's Rights Under The Eighth Amendment.* 26
a. *The Warden's Denial Of The Request Imposes Cruel And Unusual Punishment On Mr. Gerber.* 26
b. *The Warden's Denial Imposes Cruel And Unusual Punishment On The Innocent Mrs. Gerber* 28
CONCLUSION 29
Appendices ..... App. 1

TABLE OF CITED AUTHORITIES

U.S. CONSTITUTION

Amendment VIII ..... *i*, 1-2, 9, 12, 16, 22, 27
Amendment XIV, § 1 ..... *i*, 1, 16-17, 22-23, 26

CASES

Army & Air Force Exchange Service v. Sheehan
456 U.S. 728 (1982) 11

Atkins v. Virginia
__ U.S. __, 2002 Westlaw 1338045 (2002) 27

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431 U.S. 678 (1977) 13

Cleveland Bd. of Education v. Chesterfield County Sch. Bd.
414 U.S. 632 (1974) 13

Edwards v. South Carolina
372 U.S. 229 (1963) 7

Eisenstadt v. Baird
405 U.S. 438 (1972) 13

Gerber v. Hickman
291 F.3d 617 (9th Cir. 2002) ..... passim

Gerber v. Hickman
264 F.3d 882 (9th Cir. 2001) 1, 5, 14, 21

Gerber v. Hickman
103 F. Supp. 2d 1214 (E.D. Cal. 2000) 1, 4-5, 22

Goodwin v. Turner
908 F.2d 1395 (8th Cir. 1990) 15

Griswold v. Connecticut
381 U.S. 479 (1965) 9, 28-29

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501 U.S. 957 (1991) 27

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431 U.S. 145 (1977) 11

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430 U.S. 651 (1977) 26

Layne & Bowler Corp. v. Western Well Works
261 U.S. 387 (1923) 7

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491 U.S. 110 (1989) 16

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834 F.2d 326 (3d Cir. 1987) 14

Montana v. Kennedy
366 U.S. 308 (1961) 16

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482 U.S. 342 (1987) 20

One 1958 Plymouth Sedan v. Pennsylvania
380 U.S. 693 (1965) 7

Palko v. Connecticut
302 U.S. 319 (1937) ..... *i*, 29

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417 U.S. 817 (1974) 20

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505 U.S. 833 (1992) 13

Pointer v. Texas
380 U.S. 400(1965) 7

Procunier v. Martinez
416 U.S. 396 (1974) 9

Rhodes v. Chapman
452 U.S. 337 (1981) 27

Rice v. Sioux City Cemetery
349 U.S. 70 (1955) 7

Roberts v. United States Jaycees
468 U.S. 609 (1984) 21

Robinson v. California
370 U.S. 660 (1962) 28

Skinner v. Oklahoma
316 U.S. 535 (1942) ..... *i*, 8, 11-17, 22-25, 30

Solem v. Helm
463 U.S. 277 (1983) 27-28

Stanley v. Illinois
405 U.S. 645 (1972) 13

Thompson v. City of Louisville
362 U.S. 199 (1960) 16

Thornburgh v. Abbott
490 U.S. 401 (1989) 9, 26

Turner v. Safley
482 U.S. 78 (1987) 4, 9-10, 16-19

United States v. Doe
465 U.S. 605, (1984) 11

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467 U.S. 180 (1984) 7

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434 U.S. 374 (1978) 8-9, 29

STATUTES, RULES, AND ADMINISTRATIVE CODES

FEDERAL

5 U.S.C. § 8341 19
28 U.S.C. § 41 5
28 U.S.C. § 1254(1) 1
42 U.S.C. § 402 19
42 U.S.C. § 1983 3
Fed. R. Civ. Proc. 12(b)(6) 4
Fed. R. Civ. Proc. 56 5
Sup. Ct. R. 10(a) 14
Sup. Ct. R. 10(c) 7, 11

STATE

Cal. Penal Code § 667 23
Cal. Penal Code § 1170.12 23
Cal. Prob. Code § 6402 19
Cal. Code Regs. tit. 15, § 3174 ..... 21, 23, 28
1989 Cal Stat. ch. 1043, § 1 23

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TABLE OF APPENDICES

Gerber v. Hickman
291 F.3d 617 (9th Cir. 2002)
(En banc decision).....App. 1

Gerber v. Hickman
273 F.3d 843 (9th Cir. 2001)
(Order granting rehearing en banc).....App. 25

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(Three-judge panel decision).....App. 27

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103 F. Supp. 2d 1214 (E.D. Cal. 2000)
(District court decision).....App. 47

Gerber v. Hickman
Not officially reported (E.D. Cal. 2000)
(Findings and recommendations of
magistrate judge).....App. 57

PETITION FOR A WRIT OF CERTIORARI

Petitioner William Gerber respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

CITATIONS OF OPINIONS AND ORDERS

The district court's opinion (per Damrell, D.J.) granting the respondent's motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure (Appendix ["App."] 47-55) is published at *Gerber v. Hickman*, 103 F. Supp. 2d 1214 (E.D. Cal. 2000). The three-judge panel of the Court of Appeals for the Ninth Circuit majority opinion (per Bright, J.) (reversing the district court decision), and dissenting opinion (per Silverman, J.), (App. 27-46), are published at *Gerber v. Hickman*, 264 F.3d 882 (9th Cir. 2001). The Ninth Circuit's order granting a rehearing en banc (App. 25) is published at *Gerber v. Hickman*, 273 F.3d 843 (9th Cir. 2001). The en banc panel six-judge majority opinion (per Silverman, J.) (affirming the district court decision), and two dissenting opinions (five-judge dissent per Tashima, J., and three-judge dissent per Kozinski, J.), (App. 1-24), are published at *Gerber v. Hickman*, 291 F.3d 617 (9th Cir. 2002).

STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. section 1254(1) to review by writ of certiorari the judgment of the of the United States Court of Appeals for the Ninth Circuit in *Gerber v. Hickman*, dated May 23, 2002, issued following the rehearing en banc conducted pursuant to the order respecting rehearing dated December 4, 2001.

CONSTITUTIONAL PROVISIONS INVOLVED

" . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

-- U.S. CONST., amend. XIV, § 1.

"Excessive bail shall not be required, nor excessive fines

imposed, nor cruel and unusual punishments inflicted."
-- U.S. CONST., amend. VIII.

STATEMENT OF THE CASE

I. The Underlying Facts

Petitioner William Gerber ("Mr. Gerber") is serving a sentence of 100 years to life plus 11 years under California's "three strikes" law for the act of shooting his own television set. Mr. Gerber's life sentence was not as a result of charges of any offense resulting in bodily harm, nor, over the course of his entire life, has he ever been charged with such an offense. At Mr. Gerber's sentencing hearing, the supposed "victim" of the crime, his wife Evelyn Gerber, pleaded with the sentencing court for leniency in sentencing. In rejecting Mrs. Gerber's plea, the sentencing court acceded to the State's expressed desire that Mr. Gerber "never see the outside of the prison again." Mr. Gerber was sent to Mule Creek State Prison in Ione, California.

Mr. and Mrs. Gerber profoundly desire to bear a child together, and have so desired since before the acts giving rise to Mr. Gerber's incarceration. It is still the Gerbers' desire to have a child, notwithstanding Mr. Gerber's incarceration for life. It is their desire that the child be biologically fathered by Mr. Gerber—Mrs. Gerber is not interested in adopting a child or having some man other than her husband father a child.

Though the California Department of Corrections ("CDC") allows conjugal visits for most married inmates, it generally does not allow such visits for married life-term inmates, including Mr. Gerber. Mr. Gerber formally made a request to the warden of that prison, respondent Warden Roderick Hickman ("the Warden"),[1] that he be allowed to provide his wife with a semen sample. Specifically, Mr. Gerber asked that he be permitted to have his attorney or a private physician receive the collection at the prison for

1. The Warden was originally improperly named as "Rodney" Hickman in the complaint that gave rise to this petition.

transfer to a laboratory or health care provider, all at his and his wife's own expense. The Warden denied this request.

Mr. Gerber even located a company that could receive a collection of semen by overnight mail and preserve it for the eventual artificial insemination of Mrs. Gerber. Through this procedure, a laboratory would mail a plastic collection receptacle to Mr. Gerber at the prison. The laboratory would also provide a prepaid return mailer, for returning the filled collection receptacle. Mr. Gerber would then ejaculate into the receptacle. The filled receptacle would then be returned to the laboratory in the prepaid mailer by overnight mail. At that point all further steps would occur outside the prison; for example, the laboratory would arrange the transfer of semen to a health care provider for the artificial insemination of Mrs. Gerber.

Mr. Gerber and his wife are willing to bear all of the costs of the collection of Mr. Gerber's semen, including reimbursement to the CDC for any costs associated with the mailing of the receptacle or the monitoring of the same. Furthermore, the prison maintains comprehensive policies and rigorous procedures to ensure the safety and propriety of any items received or sent in the mail by inmates, and Mr. Gerber does not object to the application of those procedures to the collection receptacle.

Through counsel, Mr. Gerber proposed this simple procedure to the Warden. The Warden refused and continues to refuse to comply with Mr. Gerber's simple, yet highly important, request. This forced Mr. Gerber to turn to litigation—an action for injunctive relief pursuant to 42 U.S.C. section 1983 against the Warden that gives rise to this petition—to enforce his and his wife's constitutional right to procreate.

II. Procedural History

A. Proceedings In The District Court

The operative complaint, filed in the United States District Court for the Eastern District of California, alleges

that the Warden violated Mr. Gerber's constitutional rights by prohibiting him from providing semen to artificially inseminate his wife. In his complaint, Mr. Gerber did not pray for monetary damages; he sought only injunctive relief.

In lieu of filing an answer to Mr. Gerber's complaint, the Warden moved to dismiss the complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, or alternatively, for summary judgment. The Warden predicated his motion to dismiss on his assertion that the fundamental constitutional right to procreate does not survive incarceration. The Warden's motion was primarily premised on *Turner v. Safley*, 482 U.S. 78 (1987).

The hearing on the motion to dismiss, or alternatively, motion for summary judgment, was held before Magistrate John F. Moulds on March 2, 2000. On March 7, 2000, the magistrate filed findings and recommendations recommending the denial of the motion. (App. 57-61.) The magistrate determined that an inmate retains those constitutional rights that are not inconsistent with the status of being a prisoner or with the legitimate penological interests of the prison. (App. 59.) In his findings and recommendations, the magistrate stated that persuasive reasons support Mr. Gerber's position that the right to procreate survives incarceration, and that additional discovery and a full record would allow the court to properly determine whether this right is in fact consistent with the status of being a prisoner and with the legitimate interests of the prison. (App. 60.) It was for these reasons that the magistrate recommended denial of the motion to dismiss. (*Id.*) The magistrate also recommended the denial of the motion for summary judgment on the grounds that Mr. Gerber made a substantial showing that numerous factual issues were in dispute. (App. 60-61.)

The district judge rejected the magistrate's findings and recommendations, and granted the Warden's motion to dismiss Mr. Gerber's complaint under Rule 12(b)(6) of the Federal Rule of Civil Procedure. (App. 55.) The district

court made no ruling on the motion for summary judgment.[2] In making its ruling, the district court relied on non-controlling authority to determine that the fundamental right to procreate does not survive incarceration under any circumstances. (App. 49-54.)

Mr. Gerber appealed to the United States Court of Appeals for the Ninth Circuit to review the judgment pursuant to 28 U.S.C. section 41.

B. Proceedings In The Ninth Circuit

The appeal was argued and submitted before a three-judge panel of the Ninth Circuit on December 13, 2000. On September 5, 2001, the three-judge panel issued an opinion reversing the district court's dismissal, holding that the right to procreate is not inherently inconsistent with incarceration, and remanding the case to the district court for determination under *Turner v. Safley*, 482 U.S. 78 (1992), of whether, on the facts, the Warden's denial of Mr. Gerber's request was reasonably related to a legitimate penological interest. (App. 39, 43.) Judge Barry G. Silverman dissented, taking the position that the right to procreate does not survive incarceration. (App. 46 (Silverman, J., dissenting).)

Following briefing on its own motion, the Ninth Circuit ordered on December 4, 2001 that the appeal be reheard en banc. (App. 25.) Accordingly, the appeal was reargued on March 20, 2002, before an eleven-judge panel. Only one member of the three-judge panel, the dissenting Judge Silverman, was drawn for the en banc panel.

On May 23, 2002, the en banc panel issued a majority opinion in which only six of the eleven judges joined, affirming the district court's dismissal of the case. (App. 10.)[3] The majority opinion was authored by Judge

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2. As noted by the magistrate, Mr. Gerber submitted evidence in response to the motion for summary judgment clearly demonstrating that there were numerous genuine issues of material fact precluding summary judgment under Rule 56 of the Federal Rules of Civil Procedure. (App. at 60-61.)

3. Unless otherwise indicated, all further citations to the Appendix in this

Silverman. As in his earlier dissent, Judge Silverman opined that the right to procreate is fundamentally inconsistent with incarceration. (App. 9.) The majority opinion also held that the district court's dismissal without leave to amend was not an abuse of discretion. (App. 9-10.)

Five of the eleven judges dissented from the majority opinion, on the grounds that there is nothing in the record nor common sense that indicates that procreation *simpliciter* is fundamentally inconsistent with the fact of incarceration. (App. 10-11 (Tashima, J., dissenting).) In addition, three judges dissented in a separate dissenting opinion by Judge Alex Kozinski, observing that there is nothing inherently inconsistent about the mechanics of procreation as Mr. Gerber had proposed, that the California legislature had not authorized deprivation of the right to procreate as a form of punishment, and that these rights are "far too important to be abrogated based on nothing more than the personal opinion of prison bureaucrats . . . ."(App. 19-24 (Kozinski, J., dissenting).)

As Judge Silverman was the only judge on the en banc panel who also served on the original three-judge panel, a total of 13 judges in the Ninth Circuit reviewed Mr. Gerber's appeal. Of those 13 judges, seven agreed the district court's decision should have been reversed, while only six agreed that the case should be affirmed. It is only the distribution of the judges—and the happenstance that one judge was able to vote twice—that resulted in the Ninth Circuit's affirmance of the district court's judgment.

REASONS FOR GRANTING THE WRIT

The issues in this case are crucial—not only for Mr. and Mrs. Gerber, but also for all who are concerned about the level to which members of our free society are required to tolerate unjustified governmental interference with the very personal decision of whether to bear and beget children, a right that is perhaps the most basic and

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petition refer to the en banc panel decision.

compelling need of any life form.

There are compelling reasons to grant this petition, including several reasons identified in Rule 10 of the Rules of the Supreme Court: (1) the en banc majority decided an important question of federal law that has not been, but should be, settled by this Court; (2) the en banc majority decided an important federal question in a way that conflicts with relevant decisions of this Court; and (3) the en banc decision conflicts with at least one decision of another United States Court of Appeals.

The importance of the case can scarcely be overstated. The en banc decision seriously obstructs the exercise of fundamental constitutional protections, not just of an inmate, but of the innocent inmate's spouse. The constitutional protections at stake include fundamental liberty interests, particularly regarding marriage and procreation. The decision effectuates a deprivation of a fundamental aspect of life itself, without any legislative authority to do so.

I. Certiorari Is Proper, Because The Ninth Circuit's En Banc Majority Decided An Important And Unsettled Question Of Federal Law.

Certiorari is proper where an important constitutional right is at stake, and where the issue is novel and important. (SUP. CT. R. 10(c). *See also* R. STERN, E. GRESSMAN, S. SHAPIRO & K. GELLER, SUPREME COURT PRACTICE [hereinafter, "STERN & GRESSMAN"] § 4.12 at 186-87 (7th ed. 1993).)[4] This Court has defined "importance" to refer to the importance of the issues "'to the public as distinguished from' importance to the particular 'parties' involved." (*See id.* § 4.11 at 184.)[5]

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4. Citing *Edwards v. South Carolina*, 372 U.S. 229, 230 (1963), *Pointer v. Texas*, 380 U.S. 400, 401 (1965), *United States v. Gouveia*, 467 U.S. 180 (1984), and *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 696 (1965).

5. Citing *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923) and *Rice v. Sioux City Cemetery*, 349 U.S. 70, 79 (1955)

As the Warden himself argued in briefs directed both to this Court and the Ninth Circuit: "It is difficult to dispute that this case poses an 'important question of federal law that has not been, but should be, settled by th[e Supreme] Court.'"[6] Mr. Gerber agrees with the Warden that this case poses an important question that should be settled by this Court.

The issue of whether the constitutional right to procreate survives incarceration is vitally important for the same reason the Court granted review in *Skinner v. Oklahoma*: because the decision allowing the government to permanently terminate an individual's right to procreate raises "grave and substantial constitutional questions." (*Skinner v. Oklahoma*, 316 U.S. 535, 536 (1942).) Describing the public interest at stake, the *Skinner* Court observed that a state's power to permanently terminate an individual's right to procreate "may have subtle, far-reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear." (*Id.* at 541.)

Because Mr. Gerber is a life-term inmate, not eligible for conjugal visits under California regulations, the Warden's refusal to allow him to artificially inseminate his wife involves the same permanent governmental deprivation of the right to procreate, with the same potential for eradication of certain types of people. It is sterilization on the installment plan.

Moreover, the effects of this decision reach beyond Mr. Gerber to his faithful and dedicated wife, and to other spouses of inmates, who have the constitutional right to procreate exclusively with their spouses. (*See Zablocki v.*

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6. *See* Appellee's Motion to Stay the Mandate, September 10, 2001, at p. 5, citing STERN & GRESSMAN, § 4.11 at 184. *See also* Application To Stay Mandate Of United States Court of Appeals for the Ninth Circuit Pending Certiorari, September 19, 2001, at p. 10-11 (arguing "importance" present based on government body litigant and asserted public interests represented by the Warden).

Redhail, 434 U.S. 374, 386 (1978) (recognizing decision to marry and raise family entitled to same protection as right to abortion); *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) (recognizing constitutional right of married couples to make decisions about child bearing).) Absent from the en banc majority opinion is any discussion about the vital impact the decision has on the procreative rights of non-inmate spouses such as Mrs. Gerber.[7]

The effects of the en banc decision are even more profound in that the decision undermines the very institution of marriage, which this Court recognized survives incarceration in *Turner v. Safley*, 482 U.S. 78 (1987). By cutting off all avenues of procreation for inmates and their spouses, the en banc majority drives a wedge in the marital relationship, and undermines society's interest in encouraging individuals to have children within marital relationships.

Furthermore, the en banc decision that "the right to procreate while in prison is fundamentally inconsistent with incarceration," combined with its misapplication of the Eighth Amendment to exclude the right to procreate from being part of "the minimal civilized measure of life's necessities," could mean that a pregnant female inmate may have no recourse against prison personnel who force or cause an involuntary abortion, as childbearing would not be considered one of "life's necessities."[8] (*See* App. 9, 10.) Further, the en banc decision suggests that prison officials could deny a pregnant inmate's request to obtain an

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7. *See* App. 23-24 (Kozinski, J., dissenting); *Turner v. Safley*, 482 U.S. at 85, quoting *Procunier v. Martinez*, 416 U.S. 396, 409 (1974), *overruled on other grounds by Thornburgh v. Abbott*, 490 U.S. 401, 413014 (1989) (recognizing the need to consider the impact of prison restrictions on the constitutional rights of those who are not prisoners).

8. Mr. Gerber firmly believes that childbearing is indeed one of life's necessities. Accordingly, under the Eighth Amendment, the prison must not interfere with his, or pregnant inmates', rights to procreate, where exercise of the right does not undermine legitimate penological interests. (*See* Section IV.B.2 of this petition, *infra* at 26-29.)

abortion on the basis that the right to choose abortion is a procreative right, and as such, does not survive incarceration.

In addition, the issues raised are novel. This Court has not addressed the question of whether the right to procreate, in some form, is not inconsistent with incarceration under the framework set forth in *Turner*. Nor has the Court addressed the question of whether a prison official may effectuate the aims of sexual sterilization on life-term inmates without any legislative authority and without any compelling, or merely legitimate, reason to do so.

The case has generated national, as well as international, public interest. The hearings and decisions before the three-judge panel and the en banc panel garnered reports and commentary in numerous newspapers and news broadcasts across the country and around the world.[9]

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9. The story was widely reported in the United States in the print and broadcast media. (*See, e.g.* Henry Weinstein, *Inmate May Not Ship Wife Semen*, L.A. TIMES, May 24, 2002, at B1; Denny Walsh, *Inmate loses plea to father a child*, SACRAMENTO BEE, May 24, 2002, at A2; David Kravets, *Court Rules on Prisoner's Semen*, WASH. POST (visited May 25, 2002) http://www.washingtonpost.com/wp-dyn/articles/A1764-2002May23.html; *Court: No Inmate Procreation Rights* (visited May 25, 2002) http://www.cnn.com/2002/law/05/23/prisoner.semen.ap; Broadcast interview of Teresa L. Zuber, MSNBC News, March 22, 2002, 8:25 a.m. E.S.T.; Garry Abrams, *Absentee-Fatherhood Effort Lives, Despite Long-Odds Underdog Status*, L.A. DAILY JOURNAL, Sept. 25, 2001, at A1; George Will, *Inmates and Proud Parents*, WASH. POST, November 8, 2001, at A31.) It was also discussed in news reports, commentary, and feature stories in many other countries, including Germany (*see, e.g.*, Ralf Hoppe, *Ein Kind namens Moon*, DER SPIEGEL, July 8, 2002, at 125; *Samen per Post: US-Häftling Will Sich Fortpflanzen*, RHEINISCHE POST (visited July 8, 2002) http://www.rp-online.de/news/journal/2002-0321/fortpflanzung .html); England (*see, e.g., Prison Procreation Lawsuit Reinstated*, (visited March 23, 2002) http://news.bbc.co.uk/hi/English/world/Americas/newsid_1529000/1529425.stm); Australia (*see, e.g., Inmate wants okay to post sperm*, THE AUSTRALIAN (visited July 8, 2002) http://www.news.com.au/common/story_page/0,4057,3998553%5E1702,00.html); Brazil (*see, e.g., Preso quer mandar sêmen para mulher* (visited July 8, 2002) http://www.cidadeinternet.com.br/br/portales/erotica/nota/0,2600,24961,00.html); Spain (*see, e.g., Una sentencia permite ser padre a un condenado a cadena perpetua*, EL MUNDO (visited July 8, 2002) http://www.el-mundo.es/2001/09/09/sociedad/

The right to procreate is undoubtedly an important constitutional right, and the issues presented in this petition present novel and important questions.

II. Certiorari Is Proper, Because The Ninth Circuit's En Banc Opinion Decided An Important Federal Question In A Way That Conflicts With Relevant Decisions Of This Court.

Rule 10(c) of the Supreme Court Rules provides as a compelling reason for granting a writ of certiorari that a United States court of appeals "has decided an important federal question in a way that conflicts with relevant decisions of this Court." (SUP. CT. R. 10(c).) Such a conflict must be direct, but may occur "from an arguable misinterpretation or misapplication of the precedent," such that the conflict is "apparent."[10] The en banc decision presents a direct and apparent conflict with this Court's profoundly important holding in *Skinner v. Oklahoma*.

In the context of an earlier version of a "three strikes" law, this Court ruled in *Skinner v. Oklahoma* that the right to procreate is a fundamental constitutional right, and further held that a state may not permanently deprive one class of convicted individuals the right to procreate, while allowing another similarly situated class to do so, without establishing a compelling state interest to support such discrimination. (*Skinner v. Oklahoma*, 316 U.S. at 541-42. *See also* App. 23 (Kozinski, J., dissenting) (stating that "[s]uch a right may be abrogated only pursuant to lawful authority and for compelling reasons").)

Yet the en banc holding that the right to procreate is

1045460_imp.html); Indonesia (*see, e.g., Tahanan dilarang kirin sperma lewat surat* (visited July 8, 2002) http://www.satulelaki.com /peristiwa /0,26622,00.html); and Hungary (*see, e.g., Postán nemzene az elítélt kaliforniai* (visited July 8, 2002) http://www.index.hu /politika/bulvar/ sperma/).

10. STERN & GRESSMAN § 4.5 at 174, citing *United States v. Doe*, 465 U.S. 605, 610 (1984), *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 926 (1982), *Army & Air Force Exchange Service v. Sheehan*, 456 U.S. 728, 733 (1982), and *Henderson v. Kibbe*, 431 U.S. 145, 152 (1977).

"fundamentally inconsistent with incarceration" means that the Warden need present no reason—compelling or even pretextual—to justify his permanent deprivation of prisoners' right to procreate. (*See* App. 4, 9.) This holding thereby eviscerated *Skinner*'s holdings that this right is *fundamental* and that the government may not extinguish this right *except upon a showing of a compelling interest* sufficient to justify the deprivation.

The en banc majority attempted to exempt Mr. Gerber's case from the mandates of *Skinner* based on the means of permanent deprivation of the right to procreate. In particular, the en banc majority contended that *Skinner* applies only to "forced surgical sterilization," because sterilization is "intrusive, permanent, and irreparable." (App. 6 (emphasis omitted).)

In Mr. Gerber's case, the Warden's deprivation of Mr. Gerber's right to procreate is no less permanent and irreparable than sterilization for one simple reason: *Mr. Gerber is a life-term inmate.* The en banc majority's remaining purported distinction, the intrusive nature of surgical sterilization, is irrelevant, because the *Skinner* Court did not rely on this factor at all. Intrusiveness pertains more appropriately to analysis under the Eighth Amendment's bar against cruel and unusual punishment. But *Skinner* explicitly declined to consider that issue. (*Skinner*, 316 U.S. at 538.) Indeed, while *Skinner* dealt with a statute that provided for surgical sterilizations in the forms of vasectomy for a male and salpingectomy for a female (*id.* at 537), not one word of the majority or concurring opinions in *Skinner* mentions, or even alludes to, the intrusive nature of these procedures as a basis for the decision. It is hard to imagine that, had the statute in *Skinner* provided for life in prison *as a means to prevent procreation*, whether for punitive or eugenic goals, this Court would have upheld it in *Skinner*.

On the contrary, *Skinner* rests entirely on the Court's concern about government's ability to prevent an individual from propagating:

> The power to sterilize, if exercised, may have *subtle, far-reaching and devastating effects.* In evil or reckless hands it *can cause races or types which are inimical to the dominant group to wither and disappear.* There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. *He is forever deprived of a basic liberty.*

(*Skinner*, 316 U.S. at 541 (emphasis added).) Accordingly, the intrusive nature of surgical sterilization is a distinction without a difference. Otherwise, a government could constitutionally permanently *chemically* sterilize someone, while advancing no compelling interest, on the ground that chemical sterilization does not involve *surgical* sterilization, as was at issue in *Skinner*.

Indeed, if physical intrusiveness were the operative consideration for the *Skinner* court, *Skinner* would only stand for the proposition that "liberty," within the meaning of the due process clause, includes only the right *to be free from forced surgical sterilization*, not the right to procreate generally. (*See* App. 17 (Tashima, J., dissenting).) Numerous Supreme Court cases refute this narrow reading in rulings recognizing that the constitution protects the right to procreate from governmental interference outside the context of forced sterilization.[11]

Skinner therefore means what it says: that "[m]arriage and procreation are fundamental to the very existence and survival of the race" and that the constitution requires review by strict scrutiny to determine whether the

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11. *See, e.g., Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992) (concerning right to abortion); *Carey v. Population Services Int'l*, 431 U.S. 678, 685 (1977) (concerning right of minors to access birth control); *Cleveland Bd. of Education v. Chesterfield County Sch. Bd.*, 414 U.S. 632, 640 (1974) (concerning right of school teacher not to be fired for becoming pregnant); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (concerning right of unmarried individuals to have access to birth control); *Stanley v. Illinois*, 405 U.S. 645, 651-652 (1972) (concerning right of unmarried father to have custody of his child after death of child's mother).

government may deprive individuals of this fundamental right, even for those convicted of crimes. (*Skinner*, 316 U.S. at 541.) The en banc holding that the right to procreate in prison is "fundamentally inconsistent with incarceration," without any showing of a compelling, or even trivial, reason to justify this decision, conflicts with *Skinner*. This Court's review is necessary to resolve this conflict.

III. Certiorari Is Proper, Because The Ninth Circuit's En Banc Decision Conflicts With Every Other Published Opinion In The United States Courts Of Appeals On The Same Important Issue Of Whether The Right To Procreate Survives Incarceration.

Another compelling reason meriting Supreme Court review exists when "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." (SUP. CT. R. 10(a).) Aside from Judge Silverman's own dissent in the original three-judge panel, the en banc majority decision that the right to procreate does not survive incarceration under any circumstances conflicts with every other published opinion, majority or dissenting, in the United States Courts of Appeals.

The first glaring conflict is with the Third Circuit's decision in *Monmouth County Correctional Institution Inmates v. Lanzarro*, 834 F.2d 326 (3d Cir. 1987). In *Monmouth County*, the court specifically recognized that the right to procreate exists in the prison context. (*Id.* at 333 n. 11.) The court relied on this proposition in recognizing that a woman's constitutional right to choose abortion over childbirth also exists in the prison context. (*Id.* at 335.)

Similarly, below, the three-judge panel of the Ninth Circuit held, with ample support, that the right to procreate survives incarceration. (App. 33-39 (three-judge panel decision).) Furthermore, the five-judge dissenting opinion submitted with the en banc opinion recognized that the record fails to support a conclusion that the right to procreate *simpliciter* does not survive incarceration. (App.

10-19 (Tashima, J., dissenting).) Similarly, the three-judge dissenting opinion notes that neither "committing Onan's transgression," nor "mailing a package, or handing it to your lawyer" is even "remotely inconsistent with incarceration." (App. 19-20 (Kozinski, J., dissenting).)

Moreover, even while erroneously concluding, on the specific facts before it, that a ban on artificial insemination was reasonably related to a penological interest, the Eighth Circuit's decision in *Goodwin v. Turner*, 908 F.2d 1395 (8th Cir. 1990), assumed that the right to procreate *survives incarceration*.[12] (*Id.* at 1398.) The dissenting opinion in *Goodwin* analyzes the issue in detail, and explains why the right to procreate survives incarceration. (*Id.* at 1401-03 (McMillian, J., dissenting).)

The bare majority en banc opinion conflicts with every other court of appeals opinion, majority or dissenting (except for Judge Silverman's own previous dissent), ever published on whether the right to procreate survives incarceration.

Furthermore, the conflict on this issue is bound to create confusion in the lower courts as they struggle to determine such issues as, for example, whether an inmate who had previously frozen his or her gametes prior to incarceration may release the frozen gametes to a spouse or surrogate mother,[13] whether prisons may require inmates to use contraceptives during conjugal visits solely to prevent procreation, whether pregnant inmates may opt for abortion, and whether pregnant inmates may be forced to endure involuntary abortions. The en banc decision is truly

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12. Strangely, the en banc opinion does not even cite the Eighth Circuit's review of the district court's decision in *Goodwin v. Turner*.

13. Counsel for the Warden conceded during oral argument at the rehearing en banc that the prison *could not* prevent an inmate from procreating if the inmate had the foresight to deposit his semen before being incarcerated, and the inmate's spouse obtained the semen from the sperm bank. The Warden thereby concedes that becoming a parent through artificial insemination is not inherently inconsistent with incarceration.

unprecedented in the courts of appeal in its sweeping and unsubstantiated holding. Supreme Court review is necessary to resolve these conflicts.

IV. Certiorari Is Proper, Because The En banc Opinion Is Wrong, Results In A Gross Miscarriage of Justice, Erodes The Important Constitutional Rights To Marriage And Procreation, And Is Unduly Harsh.

Supreme Court review is appropriate where the result reached below represents a gross miscarriage of justice, erodes an important legal principle or is unduly harsh. (STERN & GRESSMAN § 4.17 at 194 (citing, *inter alia, Montana v. Kennedy*, 366 U.S. 308, 309 (1961) and *Thompson v. City of Louisville*, 362 U.S. 199 (1960).) The wrongness of the en banc decision results in all of these injustices.

As discussed below, the en banc decision is wrong for two major reasons: (1) it fails to abide by the holdings of *Skinner v. Oklahoma* and *Turner v. Safley*, 482 U.S. 78, 84 (1987) in deciding that the right to procreate does not survive incarceration at all, and (2) it fails to recognize that imposition of the gratuitous punitive measure of permanently depriving an inmate and his spouse the right to procreate violates the Equal Protection Clause and the Eighth Amendment. In these respects, the decision results in a gross miscarriage of justice and is unduly harsh.

Further, the impact of the decision severely erodes the important constitutional right to procreate and undermines the integrity of the constitutional right to marry. This Court has recognized that the integrity of the marital union is undermined when other individuals might be involved in issues relating to having children within a marriage. (*Michael H. v. Gerald D.*, 491 U.S. 110, 131 (1989) (Scalia, J., plurality opinion).) For couples such as the Gerbers, the en banc decision leaves them no option but to either go childless or involve another individual to impregnate Mrs. Gerber. The en banc decision thereby both erodes the right to procreate and undermines the integrity of the marital union *for no legitimate reason whatsoever*.

A. The En Banc Opinion Incorrectly Concludes That The Right To Procreate Is Inconsistent With Incarceration.

No one disputes that the Constitution protects the right to procreate. (*See* U.S. CONST. amend. XIV; *Skinner v. Oklahoma*, 316 U.S. 535 (1942).) The en banc majority acknowledged that "prison walls do not form a barrier separating prison inmates from the protections of the Constitution." (App. 3, quoting *Turner v. Safley*, 482 U.S. at 84.) The en banc majority, however, quoted these principles without applying them, and failed to discharge its duty to protect constitutional rights of prisoners. (*See, e.g., Turner v. Safley*, 482 U.S. at 84 (stating "[w]hen a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights").)

This Court has held that "a prison inmate retains those constitutional rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system." (*Id.* at 94; *Pell v. Procunier*, 417 U.S. 817, 822 (1974).) In *Turner v. Safley*, this Court elucidated this principle by setting forth a two-prong test to determine whether a prison regulation is constitutional.

The first prong of the *Turner* test examines whether the constitutional right at stake survives incarceration in general. (*Turner*, 482 U.S. at 94-96.) It is this prong upon which the en banc majority relied in reaching its erroneous decision.[14] Under *Turner*, the court was required to decide whether the right to procreate is affected "by the fact of confinement or the pursuit of legitimate corrections goals." (*Id.* at 95-96.) If sufficient attributes are unaffected by confinement or legitimate goals, the right is deemed to

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14. The second prong examines whether the right that survives incarceration is reasonably related to a legitimate penological interest. (*Turner*, 482 U.S. at 89, 96-97.) The en banc majority did not reach this prong.

survive incarceration. (*Id.* at 89, 96.)

The en banc majority, however, failed to consider any attributes of the right to procreate, and even failed to apply a minimal level of genuine analysis regarding the relationship between the facts relating to the right to procreate and the nature and purposes of incarceration.[15] (*See* App. 17 (Tashima, J., dissenting) (stating that neither facts in the record nor the majority's vague references to penological needs support the conclusion that procreation is fundamentally inconsistent with incarceration); App. 20-21 (Kozinski, J., dissenting) (noting that prison authorities offered no proof that either physical acts required to deliver semen collection out of prison, or recipient's use of collection, have any effect on legitimate interests of prison).)

The en banc panel should have followed this Court's methodology in *Turner* by undertaking a careful examination of the attributes of the right at stake and the circumstances of incarceration to determine whether the right is not inconsistent with incarceration. (*See* App. 12-13 (Tashima, J., dissenting). *See also Turner v. Safley*, 482 U.S. at 95-96.)

Analyzing the right to marry in the prison context in *Turner*, the Court observed that many attributes of marriage survive incarceration, even after taking into account the

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15. Disturbingly, the en banc majority opinion cited an inapplicable law review article to support its cursory dismissal of the technological advancements that would allow an inmate to procreate without any measurable burden on the prison. The majority cited Jack B. Weinstein and Catherine Wimberly's article, *Secrecy in Law and Science*, 23 CARDOZO L. REV. 1, 9-11 (2001) to support its proposition that whether the right to procreate survives incarceration is unaffected by scientific advancements in reproductive technology. (App. 7.) The majority's position is akin to suggesting that sending and receiving mail is inconsistent with incarceration, because the law cannot countenance the invention of paper and pen. Weinstein and Wimberly's article has absolutely nothing to do with the court's untenable proposition. Rather, the cited pages of the article describe the adversary system's pressure on scientific experts to maintain consistency in spite of their willingness to adjust conclusions. (Weinstein & Wimberly, *supra*, at 9-11.)

limitations imposed by prison life. (*Turner*, 482 U.S. at 95.) Among these attributes are (1) the expressions of emotional support and public commitment that marriage provides, (2) the fact that marriage is often an exercise of religious faith, (3) the expectation that an inmate will be released and may ultimately consummate the marriage, and (4) the fact that marital status is often a precondition to the receipt of government benefits. (Id. at 95-96.) Based on these attributes that are unaffected by incarceration, this Court held that the right to marry survives incarceration. (*Id.* at 96.)

Had the en banc majority followed this same methodology, it would have seen that nearly identical attributes of procreation are similarly unaffected by incarceration. Certainly, a son or daughter can provide enormous emotional support and public commitment. In addition, many religions include edicts to procreate. For example, Genesis 9:1 of the Judeo-Christian Bible includes the mandate from God, "Be fruitful, and multiply, and replenish the earth." Thus, procreation in many cases may be an exercise of religious faith.[16] Additionally, most inmates have an expectation of being released and ultimately of providing a physical presence for the child.[17] Finally, family status is often a precondition to the receipt of government benefits, including Social Security death benefits and inheritance rights.[18] All of these aspects of procreation are unaffected by the fact of confinement or by

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16. And it is with Mr. Gerber, a devout Christian who feels a mandate from God to beget offspring—a mandate that has been frustrated by the Warden's actions.

17. Notwithstanding the State's expressed desire that Mr. Gerber "never see the outside of the prison again," it is not beyond the realm of possibility that he may someday in the distant future be paroled, though certainly not while Mrs. Gerber is still fertile.

18. *See, e.g.*, 42 U.S.C. § 402 (Social Security death benefits to surviving children); 5 U.S.C. § 8341 (death benefits to surviving children of government employees); CAL. PROB. CODE § 6402 (intestate succession to surviving children).

the pursuit of legitimate corrections goals.

The en banc majority posited that only intangible and emotional aspects of marriage, not physical aspects, survive incarceration. (App. 8-9.) By apparent implication, the majority intimated that a constitutional right can survive incarceration if, and only if, it can exist with no physical aspect. This position is untenable. The right to marry, for example, involves the physical acts of arranging the presence of witnesses to observe the taking of wedding vows, the physical act of signing the marriage contract, and the physical act of mailing the marriage documents to the governmental agency responsible for recording the marriage. The right to free speech, which survives incarceration under *Pell v. Procunier*, 417 U.S. 817 (1974), often involves the physical acts of obtaining and using writing or art materials and depositing the writing or art objects in the mail. Free exercise of religion also survives incarceration, and includes a wide variety of physical rituals, many of which can be exercised in prison commensurate with legitimate institutional needs. (*O'Lone v. Estate of Shabazz*, 482 U.S. 342, 352 (1987) (describing inmate access to nearly unlimited congregation for prayer, access to religious leader, access to alternative meals and special eating times).)

The current state of the record on the motion to dismiss establishes that Mr. Gerber's request to procreate through artificial insemination is no different from the standpoint of the prison from mailing a urine sample to an attorney to prove innocence, or providing a blood, urine or stool sample to a private physician to obtain an independent diagnosis of disease, neither of which does the Warden contend are inconsistent with incarceration. (*See* App. 17, n.4 (Tashima, J., dissenting); App. 20-21 (Kozinski, J., dissenting).) As Judge Kozinski explained, just as an inmate may become a best-selling author by sending out a manuscript for a novel or biography, or be a graphic artist who sells his work by mail, Mr. Gerber's request "is no more inconsistent with Gerber's status as a prisoner than is any other consequence of mailing materials from prison to the

outside world." (App. 21 (Kozinski, J., dissenting).).

Furthermore, the regulations and operations of California state prisons belie the en banc majority's holding. The State of California generally provides procreative opportunities to married inmates through its family visits program, which allows conjugal visits. (*See* CAL. CODE REGS. tit. 15, § 3174.) Accordingly, it defies logic to contend that exercise of this right is inherently inconsistent with incarceration when numerous inmates procreate under this prison-operated program. (*See* App. 15 (Tashima, J. dissenting), App. 22-23 (Kozinski, J., dissenting). *See also* App. 39 (three-judge panel majority decision).)[19]

Rather than engaging in the required analysis, the en banc majority merely mentioned general correctional policies and goals of confining offenders to deter crime, protect the public, and rehabilitate the inmate, (App. 5-6), without including any discussion whatsoever about the attributes of procreation and whether these attributes are sufficiently unaffected by legitimate correctional goals. (*See* App. 10-19 (Tashima, J., dissenting).)

Instead, the en banc majority simply noted that the right of intimate association is necessarily abridged in the prison setting, to conclude that the total loss of this right "is simply part and parcel of being imprisoned." (App. 5, citing *Roberts v. United States Jaycees*, 468 U.S. 609 (1984).) Redefining "abridge" to mean "annihilate" is not constitutional analysis, and does not constitute a compelling reason, *or even a rational basis*, to justify the Warden's permanent termination of an individual's or his spouse's right to procreate. (*See* App. 14, 17-19 (Tashima, J.,

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19. Indeed, inmates with convictions for assault, battery, and even torture, mayhem or murder may be eligible for procreative opportunities. (*See* CAL. CODE REGS. tit. 15, § 3174 (generally allowing family visits for non-life-term inmates and life-term inmates with a parole date set).) But Mr. Gerber and many other life-term inmates, who have never been convicted of harming anyone, do not. (*See id.* § 3174(e)(2) (excluding inmates with sentences of life-term without the possibility of parole or life-term with no parole date set from eligibility for family visits).)

dissenting); App. 23-24 (Kozinski, J., dissenting).) The en banc majority's end-run around constitutional analysis would mean that neither the right to marry nor the right to free speech could survive incarceration either, as they also involve intimate association. But they do. And so does the right to procreate. The *en banc* opinion is blatantly wrong.

B. The En Banc Decision Improperly Allows A Warden To Gratuitously Impose The Additional Punishment Of Permanent Deprivation Of The Right To Procreate In Violation Of the Equal Protection Clause And The Eighth Amendment.

Skinner v. Oklahoma forbids the *arbitrary* removal of *reproductive potential* as a criminal punishment. No one contends that *Skinner v. Oklahoma* constitutionally mandates that prisons make extraordinary administrative efforts to accommodate the right to procreate, such as providing conjugal visits. But, where, as here, trial on the merits would show that the prisoners' reproductive ends can be served without any measurable inconvenience to the prison, the issue becomes whether reproduction can be denied for *gratuitous punitive reasons*.[20] The answer to this question is "no" under two separate strands of constitutional authority: (1) the Equal Protection Clause and (2) the cruel and unusual punishment provision of the Eighth Amendment.[21]

The denial of Mr. Gerber's request to participate in a

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20. Indeed, at oral argument for the rehearing en banc, counsel for the Warden argued, for the first time in the case, that deprivation of the right to procreate is part of the punishment upon being imprisoned.

21. During oral argument in the district court, Mr. Gerber asked the magistrate judge for leave to amend his complaint to allege additional facts and claims. Among the amendments to his complaint, Mr. Gerber intended to allege that the denial of his request violates the equal protection clause and constitutes cruel and unusual punishment. The district court dismissed his complaint, ordering the clerk to close the file, thereby foreclosing amendment. (App. 55 (district court opinion).) For the reasons set forth in this section, the en banc majority improperly held that amendment would be futile. (App. 9-10.)

costless accommodation of Mr. and Mrs. Gerber's right to procreate is an unconstitutional punitive sterilization on the installment plan.

1. ***The Denial Of Mr. Gerber's Request Violates The Equal Protection Clause.***

The denial of Mr. Gerber's request to artificially inseminate his spouse violates the equal protection clause of the Fourteenth Amendment by unjustifiably imposing the punishment of permanent deprivation of the right to procreate to one class of offenders, while allowing exercise of this right to other similarly situated offenders. (*See* U.S. CONST. amend. XIV; *Skinner v. Oklahoma*, 316 U.S. at 541-42.) The en banc majority improperly held that assertion of this claim would be futile. (App. 10.)

Mr. Gerber was sentenced to a life-term under California's "three strikes" law, enacted in 1994. (*See* CAL. PENAL CODE §§ 667, 1170.12.) Because the CDC barred conjugal visits for life-term inmates in 1995 (*see* CAL. CODE REGS. tit. 15, § 3174(e)(2), effective May 30, 1995), Mr. Gerber is not eligible for conjugal visits, and will not be eligible for parole during Mrs. Gerber's fertile years. Yet, any other offender with the same record of felonies (one of which was a juvenile conviction) as Mr. Gerber, who had been convicted prior to the effective date of the "three strikes" law, would have received a maximum sentence enhancement of only five years,[22] would therefore be eligible for conjugal visit privileges, and could exercise procreative rights through that avenue or upon release from prison.

Because Mr. Gerber is ineligible for conjugal visits and is unlikely to be released during his life (and certainly not during Mrs. Gerber's fertile years), the only feasible means for Mr. and Mrs. Gerber to procreate is through artificial insemination. The warden's denial of Mr. Gerber's

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22. The maximum sentence enhancement at the time was up to five years for each prior "serious felony" committed as an adult. (See 1989 Cal Stat. ch. 1043, § 1, (amending CAL. PEN. CODE § 667).)

request thereby utterly deprives both Mr. and Mrs. Gerber, and other married couples in the same class, of the fundamental right to procreate, whereas other similarly situated inmates who were convicted before "three strikes" (and those inmates' spouses) are not deprived of that right.

In *Skinner*, this Court required strict scrutiny review of a punishment that disparately impacted the right to procreate of two similarly situated classes of felons. (*Skinner*, 316 U.S. at 541.) The distinction between the two classes in that case concerned the time criminal intent arose in the felon's mind. (*Id.* at 541-42.) The Court required strict scrutiny review, because "[t]he equal protection clause would indeed be a formula of empty words if such conspicuously artificial lines could be drawn." (*Id.* at 542.)

The instant case similarly involves a "conspicuously artificial line" with respect to time. The effective date of the "three strikes" law arbitrarily divides Mr. Gerber and other third strike life-term inmates from other similarly situated inmates who were sentenced prior to the effective date of the "three strikes" law. Solely because Mr. Gerber was convicted after the "three strikes" law took effect, neither conjugal visits nor release from prison is available to him to permit him to father a child. The en banc majority offers no explanation that could support, under strict scrutiny, the propriety of the Warden imposing this invidious discrimination against Mr. Gerber's class of individuals. [23]

If the State of California passed a statute requiring chemical sterilization of any person sentenced to life imprisonment under the "three strikes" law, this Court would likely not hesitate to declare such a barbaric law to be unconstitutional, much as this Court did when faced with a

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23. Although the Warden may not acknowledge as much, it is likely the Warden's view that convicted criminals are "bad seeds" who should not pass along their genes, as exemplified by the Warden's suggestion that Mr. Gerber may become a father by having Mrs. Gerber find some other man to be the child's biological father. Of course, even if this is the Warden's position, he must be required to present evidence to substantiate his views.

similar law in *Skinner*. The "three strikes" law, in combination with the Warden's denial of Mr. Gerber's request, creates the same harsh result.

Instead of applying strict scrutiny, the en banc majority determined that a "rationality review" was the proper standard of review, which directly conflicts with the strict scrutiny test mandated by *Skinner* for equal protection claims alleging deprivation of the right to procreate. (*Compare* App. 10 *with Skinner v. Oklahoma*, 316 U.S. at 541.)

But even under rational basis review, the en banc majority reached an untenable conclusion. The en banc panel's illogical and circular reasoning was as follows: Mr. Gerber is not similarly situated to inmates who have the same prior conviction record but were sentenced before the effective date of the "three strikes" law, because inmates sentenced prior to 1995 "are eligible for conjugal visits." (App. 10.) Yet the inquiry of whether differential treatment exists (in this case, allowing one class to procreate while prohibiting the other from doing so) is relevant to the disparate treatment component of the equal protection analysis, *not* to the issue of whether the two classes are similarly situated. To hold that groups are not similarly situated *because they are treated disparately* would always result in the conclusion that there is *never* an equal protection violation because, under this logic, if the groups are subject to disparate treatment, then *ipso facto* they would not be similarly situated. The en banc majority relied on this stunningly circular argument to conclude that strict scrutiny review is not required.

The en banc panel then opined that the Warden's denial of the request is rational, because "maintaining contact with those outside the prison is more important for inmates who will eventually be released." (*Id.*)[24] This

24. The Warden at no point asserted this interest; the en banc majority invented this basis for the Warden's denial of Mr. Gerber's request. As this was not an interest asserted by the Warden, nor supported by anything in the motion to dismiss, the majority's reliance on its own made-up interest cannot form the basis for denying Mr. Gerber's claim.

interest is not rationally related to any legitimate penological interest. The procedure requested by Mr. Gerber requires no more "contact with those outside" than mailing a letter. That the mailing might result in the creation of a human life in no way undermines any legitimate interest of the prison. As Judge Kozinski noted in his dissent, whether the mailing "is used to inseminate Mrs. Gerber, to clone Gerber or as a paperweight has no conceivable effect on the safe and efficient operation of the California prison system." (App. 20 (Kozinski, J., dissenting).)[25]

The en banc panel erred by foreclosing Mr. Gerber from establishing by competent evidence that the Warden's deprivation of his fundamental right to procreate violates the Equal Protection Clause.

2. *The Denial Of Mr. Gerber's Request Violates Mr. And Mrs. Gerber's Rights Under The Eighth Amendment.*

a. The Warden's Denial Of The Request Imposes Cruel And Unusual Punishment On Mr. Gerber.

Initially, the ban against cruel and unusual punishment bars unauthorized punishment. (*See Ingraham v. Wright*, 430 U.S. 651, 664-67 (1977) (summarizing the law).) As discussed above, no California statute authorizes as punishment the permanent deprivation of the right to procreate. Moreover, the CDC's own regulation allowing conjugal visits for most married inmates establishes that the legislative penalty of incarceration does not include deprivation of the right to procreate. (*See* App. 21-23 (Kozinski, J., dissenting).) On this ground alone, the Warden's denial of Mr. Gerber's request constitutes cruel and unusual punishment, as it superimposes an unauthorized penalty onto his life-term sentence.[26]

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25. *See also Thornburgh v. Abbott*, 490 U.S. 401, 413 (1989) (stating that "implications of outgoing correspondence for prison security are of a categorically lesser magnitude than implications of incoming materials").

26. Nothing in the record suggests that the Warden denied Mr. Gerber's

In addition, this Court recently reiterated that the Eighth Amendment "succinctly prohibits 'excessive' sanctions . . . . [I]t is a precept of justice that punishment for crime should be graduated and proportioned to the offense." (*Atkins v. Virginia*, __ U.S. __, __, 2002 Westlaw 1338045, at 20-21 (2002), citing *Weems v. United States*, 217 U.S. 349, 367 (1910).) Furthermore, conditions of confinement may not involve punishments "grossly disproportionate to the severity of the crime warranting imprisonment." (*Rhodes v. Chapman*, 452 U.S. 337, 347 (1981).)

A punishment is unconstitutionally disproportionate if (1) the gravity of the offense compared to the harshness of the penalty raises an inference of gross disproportionality, (2) the punishment is disproportionately severe compared to other penalties inflicted by the state, and (3) the punishment is disproportionately severe compared to other jurisdictions. (*Solem v. Helm*, 463 U.S. 277, 290-91 (1983). *See also Harmelin v. Michigan*, 501 U.S. 957, 1000 (1991) (Kennedy, J., concurring.)

Approximately 14 years after his only felony conviction as an adult, Mr. Gerber discharged a gun into his own television set. Mr. Gerber posed no threat to Mrs. Gerber at any time, and indeed she was not even home when the incident occurred. Mr. Gerber's prior convictions involved an armed burglary when he was only 17 years old, and an act of shooting into apartment walls when he was in his early to mid-twenties. None of the offenses involved bodily harm to anyone.

Considering that Mr. Gerber has never been convicted of harming anyone, the unauthorized punishment of permanently terminating Mr. Gerber's right to procreate, in addition to his life-term sentence for shooting his television, is excessively harsh and unusually severe. These circumstances raise an inference of gross disproportionality.

Moreover, Mr. Gerber's superimposed sentence is grossly disproportionate when compared to other

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request as a punishment for anything Mr. Gerber did while incarcerated.

punishments in California. Indeed, the State of California generally promotes procreative opportunities for most married inmates by providing them eligibility for conjugal visits. (*See* CAL. CODE REGS. tit. 15, § 3174.) Indeed, even life-term inmates with a parole date set may obtain conjugal visit privileges. (*Id.* § 3174(e)(2).) Accordingly, inmates with a parole date set, with convictions for assault, battery, and even torture, mayhem or murder, may be eligible for procreative opportunities. But Mr. Gerber, who was never convicted of harming anyone, does not.

Similarly, the punishment is disproportionate when compared with other jurisdictions. Not one single legislature in the country has a statute prohibiting an inmate from artificially inseminating a spouse. Further, Mr. Gerber has located no other instance in the United States where an individual has been permanently deprived of the right to procreate for the act of shooting one's own television set.

The Warden's denial of Mr. Gerber's request is cruel and unusual punishment, because it is unauthorized by the legislature and is grossly disproportionate to his crimes

b. The Warden's Denial Imposes Cruel And Unusual Punishment On The Innocent Mrs. Gerber.

Even more troubling is the fact that the Warden's denial of the request terminates the innocent *Mrs. Gerber's* fundamental right to procreate with her husband *with no basis in administrative need.* Absent such a need, termination of Mrs. Gerber's right to procreate constitutes cruel and unusual punishment.

There can be no doubt that punishing, that is, depriving the liberty of, an individual who has committed no crime constitutes cruel and unusual punishment. (*See Solem v. Helm*, 463 U.S. 277, 290 (1983); *Robinson v. California*, 370 U.S. 660, 667 (1962) (noting that a single day in jail for having a common cold would be cruel and unusual punishment).) Procreative rights within legal marriage, as a liberty interest, have had special constitutional recognition since this Court's decision in *Griswold v. Connecticut* in 1965.

(*Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (recognizing married couple's right to access birth control).) *See also Zablocki v. Redhail*, 434 U.S. 374, 386 (1978) (stating that right to procreate must mean right to enter only relationship in which sexual relations take place); *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (recognizing fundamental rights as "implicit in the concept of ordered liberty").) The right to procreate therefore includes the right to bear children *within the bounds of the marital relationship*. As Mr. Gerber's wife, Mrs. Gerber has the right to procreate with her husband.

If special administrative burdens would be required to permit an innocent spouse to be impregnated, the Constitution poses no demand that prison authorities invest their limited resources even in the accommodation of *Griswold* rights of the innocent. *But where there is no burden on the prison, the arbitrary termination of reproductive chances for married non-offenders makes a mockery of Griswold rights for all of those in Mrs. Gerber's situation.* The Gerbers must be allowed to establish that allowing their request would pose no measurable burden on the prison. In the absence of such a burden, the gratuitous termination of the innocent spouse's right to procreate with an incarcerated spouse is nothing less than cruel and unusual punishment of a completely innocent person—and in this case, the supposed "victim" of Mr. Gerber's alleged crimes.

CONCLUSION

The constitutional right to procreate is so fundamentally important that the very existence and survival of the human race depends upon it. Yet the en banc majority casually dismissed this fundamental right without requiring any showing whatsoever that the prison would be burdened at all by allowing Mr. Gerber's simple request: to send his semen to a sperm bank so that his committed and loyal wife can bear a child with her husband. The legally and factually unsubstantiated conclusion of the en banc majority conflicts with this Court's landmark decision in *Skinner v. Oklahoma*, and with numerous opinions in the

courts of appeals. Further, the erroneous decision seriously undermines the important constitutional rights of marriage and procreation.

The decision reaches far beyond the parties to this case. It reaches to the spouses of inmates who want to solidify their marriages through the bond of biological parenthood. It reaches to the entire ancestral line of these families whose dream it was to preserve their family lineage. And it reaches to the indefinable but certain loss to humanity of children who could offer their creativity, innocence, and love, to their parents, to their grandparents, to a world so desperately in need of all these things.

This Court should grant this petition to review and correct the profoundly erroneous decision of the Ninth Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX

(291 F.3d 617)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILLIAM GERBER, *Plaintiff-Appellant,*
v.
RODNEY HICKMAN, WARDEN, *Defendant-Appellee.*

No. 00-16494.
D.C. No. CV-99- 01315-FCD.

Appeal from the United States District Court
for the Eastern District of California;
Frank C. Damrell, District Judge, Presiding.

Argued and Submitted March 20, 2002—Phoenix, Arizona.

Filed May 23, 2002

Before: Mary M. Schroeder, Chief Judge, Alex Kozinski, Diarmuid F. O'Scannlain, Pamela Ann Rymer, Michael Daly Hawkins, A. Wallace Tashima, Barry G. Silverman, Ronald M. Gould, Richard A. Paez, Marsha S. Berzon, and Johnnie B. Rawlinson, Circuit Judges.

Opinion by Judge Silverman;
Dissent by Judge Tashima;
Dissent by Judge Kozinski

COUNSEL

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Gregory S. Walston, Deputy Attorney General, Sacramento, CA, for the defendant-appellee.

OPINION

SILVERMAN, Circuit Judge.

William Gerber, an inmate in the California State prison system, filed an amended complaint in federal court in which he alleged: "Petitioner asserts that Mule Creek State Prison is violating his Constitutional Rights by not allowing him to provide his wife with a sperm specimen that she may use to be artificially inseminated." Gerber sought an order of the court directing the institution to permit him to provide "a sample of sperm to artificially inseminate his wife."

The district court dismissed Gerber's suit for failure to state a claim, ruling that a prisoner does not have a constitutional right to procreate while incarcerated. *Gerber v. Hickman*, 103 F.Supp.2d 1214, 1216-18 (E.D. Cal. 2000). Because we agree with the district court that the right to procreate is fundamentally inconsistent with incarceration, we affirm.

I. BACKGROUND

We adopt the statement of facts from the district court's thoughtful opinion:

> Plaintiff, a forty-one year old man, is an inmate at Mule Creek State Prison serving a sentence of 100 years to life plus eleven years. Plaintiff's wife, Evelyn Gerber, is forty-four years old. Plaintiff and his wife want to have a baby. The California Department of Corrections ("CDC") prohibits family visits for inmates "sentenced to life without the possibility of parole [or] sentenced to life, without a parole date established by the Board of Prison Terms." Cal. Code Regs. tit. 15 § 3174(e)(2). No parole date has been set

> for plaintiff, and according to plaintiff, due to the length of his sentence, no parole date seems likely. Accordingly, he wishes to artificially inseminate his wife. To accomplish this, plaintiff requests that (1) a laboratory be permitted to mail him a plastic collection container at the prison along with a prepaid return mailer, (2) he be permitted to ejaculate into the container, and (3) the filled container be returned to the laboratory in the prepaid mailer by overnight mail. Alternatively, plaintiff requests that his counsel be permitted to personally pick up the container for transfer to the laboratory or health care provider. Plaintiff represents that he and his wife will bear all of the costs associated therewith, including any costs incurred by the CDC. Defendant [Hickman] refuses to accommodate plaintiff's request.

***620** *Gerber,* 103 F.Supp.2d at 1216 (first alteration in original).

II. JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction over this appeal pursuant to 28 U.S.C. § 1291, and we review de novo a district court's dismissal for failure to state a claim. *Monterey Plaza Hotel, Ltd. v. Local 483,* 215 F.3d 923, 926 (9th Cir. 2000).

III. ANALYSIS

A. Fundamental Rights in the Prison Setting

It is well-settled that "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution." *Turner v. Safley,* 482 U.S. 78, 84 (1987). A state could not, for example, decide to ban inmate access to mail

or prohibit access to the courts. However, "while persons imprisoned . . . enjoy many protections of the Constitution, it is also clear that imprisonment carries with it the ... loss of many significant rights." *Hudson v. Palmer*, 468 U.S. 517, 524, (1984). The very fact of incarceration thus "withdraw[s] or limit[s] . . . many privileges and rights," and this "retraction [is] justified by the considerations underlying our penal system." *Pell v. Procunier*, 417 U.S. 817, 822 (1974) (internal quotation marks omitted). Prisoners retain only those rights "not inconsistent with [their] status as . . . prisoner[s] or with the legitimate penological objectives of the corrections system." *Hudson*, 468 U.S. at 523 (quoting *Pell*, 417 U.S. at 822) (first alteration in original).

Gerber challenges the prison's refusal to allow him to artificially inseminate his wife from prison. In order to determine whether this amounts to an impermissible deprivation of Gerber's constitutional rights, our inquiry is two-fold. First, we must determine whether the right to procreate while in prison is fundamentally inconsistent with incarceration. *Turner*, 482 U.S. at 94-96. If so, this ends our inquiry. Prisoners cannot claim the protection of those rights fundamentally inconsistent with their status as prisoners.

Only if we determine that the asserted right is not inconsistent with incarceration do we proceed to the second question: Is the prison regulation abridging that right reasonably related to legitimate penological interests? *Turner*, 482 U.S. at 96-99. If it is, the regulation is valid; if not, it is unconstitutional.

B. Whether the Right to Procreate is Fundamentally Inconsistent with Incarceration

1.

We begin our analysis by inquiring whether the right to procreate is fundamentally inconsistent with incarceration. Incarceration, by its very nature, removes an

inmate from society. *Pell*, 417 U.S. at 822-23. A necessary corollary to this removal is the separation of the prisoner from his spouse, his loved ones, his friends, family, and children. *Cf. Montanye v. Haymes*, 427 U.S. 236, 242 n. 4 (1976) (noting that among the hardships that may result from a prison transfer are separation of the inmate from home and family). Once released from confinement, an inmate "can be gainfully employed and is free to be with family and friends and to form the other enduring attachments of normal life." *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972). But not until then.

***621** During the period of confinement in prison, the right of intimate association, "a fundamental element of personal liberty," *Roberts v. United States Jaycees*, 468 U.S. 609, 618 (1984), is necessarily abridged. Intimate association protects the kinds of relationships "that attend the creation and sustenance of a family--marriage, childbirth, the raising and education of children, and cohabitation with one's relatives . . . ." *Id.* at 619 (citations omitted). The loss of the right to intimate association is simply part and parcel of being imprisoned for conviction of a crime.

"[M]any aspects of marriage that make it a basic civil right, such as cohabitation, sexual intercourse, and the bearing and rearing of children, are superseded by the fact of confinement." *Goodwin v. Turner*, 702 F.Supp. 1452, 1454 (W.D. Mo. 1988). Thus, while the basic right to marry survives imprisonment, *Turner*, 482 U.S. at 96, most of the *attributes* of marriage--cohabitation, physical intimacy, and bearing and raising children--do not. "Rights of marital privacy, like the right to marry and procreate, are necessarily and substantially abridged in a prison setting." *Hernandez v. Coughlin*, 18 F.3d 133, 137 (2d Cir. 1994) (citing *Turner*, 482 U.S. at 95-96). Incarceration is simply inconsistent with the vast majority of concomitants to marriage, privacy, and personal intimacy.

Our view is informed by "the legitimate policies and goals of the corrections system . . . ." *Pell*, 417 U.S. at 822. We note that "confining criminal offenders in a facility

where they are isolated from the rest of society" serves to deter crime and protect the public. *Id.* Also, "by quarantining criminal offenders for a given period of time . . . the rehabilitative processes of the corrections system work to correct the offender's demonstrated criminal proclivity." *Id.* at 823. In this sense "[t]he curtailment of certain rights is necessary, as a practical matter, to accommodate a myriad of 'institutional needs and objectives' of prison facilities . . . ." *Hudson,* 468 U.S. at 524 (quoting *Wolff v. McDonnell,* 418 U.S. 539, 555 (1974)). Furthermore, "these restrictions or retractions also serve . . . as reminders that, under our system of justice, deterrence and retribution are factors in addition to correction." *Hudson,* 468 U.S. at 524. "[I]ncarceration, by its very nature, deprives a convicted individual of the fundamental right to be free from physical restraint," and this "in turn encompasses and restricts other fundamental rights, such as the right to procreate." *State v. Oakley,* 629 N.W.2d 200, 209 (Wisc. 2001) (citing *Meyer v. Nebraska,* 262 U.S. 390, 399 (1923)).

For example, it is well-settled that prisoners have no constitutional right while incarcerated to contact visits or conjugal visits. See *Kentucky Dep't of Corrs. v. Thompson,* 490 U.S. 454, 460 (1989) (no due process right to unfettered visitation); *Block v. Rutherford,* 468 U.S. 576, 585-88 (1984) (pretrial detainees have no constitutional due process right to contact visits); *Hernandez,* 18 F.3d at 137 (no constitutional right to conjugal visits); *Davis v. Carlson,* 837 F.2d 1318, 1319 (5th Cir. 1988) (same); *Toussaint v. McCarthy,* 801 F.2d 1080, 1113-1114 (9th Cir. 1986) (denial of contact visits does not violate Eighth Amendment).[1] The fact that California prison

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1. *See also Barnett v. Centoni,* 31 F.3d 813, 817 (9th Cir. 1994) (per curiam) (prisoner right to access to counsel not inconsistent with lack of general right to contact visits); *Bellamy v. Bradley,* 729 F.2d 416, 420 (6th Cir. 1984) (no absolute right to contact visits); *Montana v. Commissioners Court,* 659 F.2d 19, 21 (5th Cir. 1981) (no constitutional right to conjugal visits); *Lynott v. Henderson,* 610 F.2d 340, 342 (5th Cir. 1980) (no constitutional right to visitation); *Ramos v. Lamm,* 639 F.2d 559, 580 n. 26

*622 officials may choose to permit some inmates the privilege of conjugal visits is simply irrelevant to whether there is a constitutional right to conjugal visits or a right to procreate while in prison.

It is difficult, if not impossible, to reconcile the holdings of cases like Turner, Hudson, and Pell and an understanding of the nature and goals of a prison system, with a wholly unprecedented reading of the constitution that would command the warden to accommodate Gerber's request to artificially inseminate his wife as a matter of right.

2.

One issue that arose during oral argument was the effect of technological advancement on the issue before us. If, for example, science progressed to the point where Gerber could artificially inseminate his wife as easily as write her a letter, would this change our analysis? It would not. Our conclusion that the right to procreate is inconsistent with incarceration is not dependent on the science of artificial insemination, or on how easy or difficult it is to accomplish. Rather, it is a conclusion that stems from consideration of the nature and goals of the correctional system, including isolating prisoners, deterring crime, punishing offenders, and providing rehabilitation. See generally Jack B. Weinstein & Catherine Wimberly, *Secrecy in Law and Science*, 23 Cardozo L.Rev. 1, 9-11 (2001) (discussing the interaction between law and science).

3.

Gerber argues that the right to be free from forced

(10th Cir. 1980) (no constitutional right to contact visits); *McCray v. Sullivan*, 509 F.2d 1332, 1334-35 (5th Cir. 1975) (no constitutional right to conjugal visits); *Oxendine v. Williams*, 509 F.2d 1405, 1407 (4th Cir. 1975) (no constitutional right to physical contact with family); *Payne v. District of Columbia*, 253 F.2d 867, 868 (D.C. Cir. 1958) (per curiam) (no right to conjugal visits in jail).

surgical sterilization, *Skinner v. Oklahoma,* 316 U.S. 535 (1942), combined with the right to marry while in prison, *Turner,* 482 U.S. at 96, inevitably leads to the conclusion that inmates have a constitutional right to procreate while in prison. This argument fails for two reasons.

First, Skinner stands only for the proposition that *forced surgical sterilization* of prisoners violates the Equal Protection Clause. The Court in *Skinner* recognized that procreation is fundamental to the existence of the race, and thus the state's "power to sterilize, if exercised, may have subtle, farreaching and devastating effects." *Skinner,* 316 U.S. at 541. Sterilization is intrusive, permanent, and irreparable. By no stretch of the imagination, however, did Skinner hold that inmates have the right to exercise their ability to procreate *while still in prison.* The right to procreate while incarcerated and the right to be free from surgical sterilization by prison officials are two very different things. "There is simply no comparison between sterilization . . . and denial of the facilitation of artificial insemination." *Goodwin,* 702 F.Supp. at 1454 (citation omitted). The Second Circuit in *Hernandez,* 18 F.3d at 136, has recognized this crucial distinction, noting in its discussion of Skinner that "inmates possess the right to maintain their procreative abilities for later use once released from custody . . . ." Later use, not current use.

***623** Second, the Supreme Court in Turner recognized that an inmate's right to marry while in prison did not include the inmate's right to consummate the marriage while in prison or to enjoy the other tangible aspects of marital intimacy. The Turner Court held that the right to marry and "many important attributes of marriage" survive incarceration, such as expressions of emotional support and the exercise of religious faith. 482 U.S. at 95-96. However, the Court clearly stated that the right to marry "is subject to substantial restrictions as a result of incarceration," and that inmate marriages are formed "in the *expectation* that they *ultimately* will be fully consummated." *Id.* at 96 (emphasis added). The Court plainly envisioned

that while the intangible and emotional aspects of marriage survive incarceration, the physical aspects do not. See *Hernandez*, 18 F.3d at 137.

A holding that the State of California must accommodate Gerber's request to artificially inseminate his wife as a matter of constitutional right would be a radical and unprecedented interpretation of the Constitution. We hold that the right to procreate while in prison is fundamentally inconsistent with incarceration. Accordingly, we do not reach the second part of the analysis to inquire whether the prison's regulation is related to a valid penological interest.

C. State Law Claims

Gerber alleges that the Hickman's failure to accommodate his artificial insemination request violates Cal. Penal Code §§ 2600 & 2601. Section 2600 provides that "persons sentenced to imprisonment in state prison may during that period of confinement be deprived of such rights . . . reasonably related to legitimate penological interests." The test under § 2600 thus mirrors the *Turner v. Safley* inquiry. *Thompson v. Department of Corr.*, 25 Cal.4th 117, 130 (2001). We have already found that Gerber has no constitutional right to procreate while in prison. Nor can he show that the California constitution or California statutes afford him this right. The most Gerber can point to is the right to marry contained in § 2601 (permitting California prisoners to marry). Thus, Gerber cannot satisfy Thompson and fails to state a claim upon which relief can be granted. We therefore affirm the dismissal of his state law claims.

D. Leave to Amend

Gerber argues that the district court abused its discretion in dismissing his complaint without leave to amend to add equal protection and Eighth Amendment claims. We review a denial of leave to amend for an abuse

of discretion. *Simon v. Value Behavioral Health, Inc.*, 208 F.3d 1073, 1084 (9th Cir. 2000).

Gerber claims that the state's refusal to allow him to provide his wife with a sperm sample violates equal protection principles, because the state allows conjugal visits to some inmates but denies them to him. However, Gerber is not similarly situated to inmates who are eligible for conjugal visits. Inmates eligible for conjugal visits will eventually be released from prison, Cal. Code Regs. tit. 15 § 3174(e)(2), while Gerber will not. We therefore apply rationality review. *Giannini v. Real*, 911 F.2d 354, 359 (9th Cir. 1990). Because it is completely rational for prison officials to decide that maintaining contact with those outside the prison is more important for inmates who will eventually be released from prison than for those ineligible for parole, the distinction Gerber challenges is rational and his equal protection claim is without merit. Because leave to allege a ***624** violation of the Equal Protection Clause would have been futile, the district did not abuse its discretion.

Gerber also argues that denial of his artificial insemination request violates the Eighth Amendment's prohibition against cruel and unusual punishment. Because the state's denial of his request to artificially inseminate his wife can by no means be considered a deprivation of "the minimal civilized measure of life's necessities," *Hudson v. McMillian*, 503 U.S. 1, 9 (1992), granting leave for Gerber to allege an Eight Amendment claim would have been futile as well. The district court therefore acted within its discretion in dismissing Gerber's complaint without permitting leave to amend.

AFFIRMED.

TASHIMA, Circuit Judge, with whom KOZINSKI, HAWKINS, PAEZ, and BERZON, Circuit Judges, join, dissenting.

There is absolutely nothing in the record indicating

that procreation *simpliciter*--the right to have a child--is fundamentally inconsistent with the fact of incarceration. The majority has cited no facts to support such a conclusion and common sense does not lead to such a result. I therefore respectfully dissent.

The majority assumes that there is a fundamental right to procreation and I agree. There can be no dispute that such a right exists. *See Carey v. Population Servs. Int'l*, 431 U.S. 678, 685 (1977) (citing the right of personal privacy in decisions relating to marriage, procreation, contraception, family relationships, and child rearing and education, and stating that "[t]he decision whether or not to beget or bear a child is at the very heart of this cluster of constitutionally protected choices"); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (describing procreation as "one of the basic civil rights of man" and "fundamental to the very existence and survival of the race"). Thus, the question is whether that right is fundamentally inconsistent with incarceration. *See Hudson v. Palmer*, 468 U.S. 517, 523 (1984) (stating that "we have insisted that prisoners be accorded those rights not fundamentally inconsistent with imprisonment itself or incompatible with the objectives of incarceration").

"It is settled that a prison inmate 'retains those [constitutional] rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system.' " *Turner v. Safley*, 482 U.S. 78, 95 (1987) (quoting *Pell v. Procunier*, 417 U.S. 817, 822 (1974)) (alteration in the original). However, relying "largely on the repetition of glittering generalities" about the nature of incarceration "that have little, if any, application" to the facts of this case, *Rice v. Cayetano*, 528 U.S. 495, 527, 120 S.Ct. 1044, 145 L.Ed.2d 1007 (2000) (Stevens, J., dissenting), the majority concludes that the right to procreate is inconsistent with incarceration. Of course, it is true that incarceration necessarily involves the curtailment of certain rights. The repetition of this vague principle in numerous ways, however, does not explain why the right to procreate is *fundamentally* inconsistent with incarceration, and the record

before us offers no basis for that conclusion. We need not conclude at this stage of the litigation that the right to procreate necessarily *is* consistent with incarceration, but only that the record before us does not establish that it is *not*.

The rights cited by the majority that are inconsistent with incarceration--the right ***625** to intimate association and the right to privacy--are clearly inconsistent with basic attributes of incarceration because of security concerns. Procreation through artificial insemination, however, implicates none of the restrictions on privacy and association that are necessary attributes of incarceration. Being separated from loved ones is certainly a necessary attribute of incarceration; because of the technology of artificial insemination, however, procreation can be achieved without compromising security. None of the rights that are necessarily curtailed by incarceration are at issue here.

The majority relies for its conclusion on *Turner, Hudson, Pell,* and "the nature and goals of a prison system." Maj. op. at 7588-89. None of these, however, supports its position.

In *Turner,* the Supreme Court held that the fundamental right to marry survived incarceration, even though, "like many other rights, [it] is subject to substantial restrictions as a result of incarceration." 482 U.S. at 95-96. The Court reasoned that "[m]any important attributes of marriage remain ... after taking into account the limitations imposed by prison life," recounting elements of marriage that "are unaffected by the fact of confinement or the pursuit of legitimate corrections goals." *Id.* In holding that the right to marry survives incarceration, the Court therefore examined whether there were elements of the marriage relationship unaffected by incarceration "sufficient to form a constitutionally protected marital relationship in the prison context." *Id.* at 96. Even though the Court noted that "most inmate marriages are formed in the expectation that they ultimately will be fully consummated," *id.*, this fact weighed in *favor* of finding that the right to marry survived incarceration, not against it. It twists logic to construe this

statement as meaning that prisons can prohibit prisoners from fathering children. It is merely a recognition of the understandable restrictions on freedom of association and privacy attendant with incarceration. This recognition does not support a conclusion that procreation is *fundamentally* inconsistent with incarceration.

Hudson merely holds that the Fourth Amendment proscription against unreasonable searches does not apply to prison cells, a reasonable conclusion in light of the difficult safety and security concerns inherent in a prison. 468 U.S. at 526-27. By contrast, no such security concerns are implicated by Gerber's request. *Hudson* 's holding that inmates' privacy rights are abridged by the fact of incarceration does not support the conclusion that the fundamental right to procreate is similarly abridged. The majority has pointed to no facts to explain why the right to procreate should be treated in the same manner as the right to Fourth Amendment privacy.

Pell is also distinguishable. The issue in *Pell* was the constitutionality of a prison's prohibition on face-to-face interviews between inmates and the media. The Court emphasized that the prohibition involved "the entry of people into the prisons for face-to-face communication with inmates" in citing "security and related administrative problems" that justified the prohibition. 417 U.S. at 826. Unlike *Pell,* Gerber's request does not involve the entry of people into the prison or any other circumstance that presents a security or administrative concern to make it per se inconsistent with incarceration.[1] In ***626** fact, the Warden has conceded that he could not prevent prisoners from sending samples of body fluids to a forensic laboratory in

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1. *Pell* is also distinguishable because it relied on the fact that alternative "reasonable and effective means of communication" remained open to prison inmates in finding the prohibition constitutional. 417 U.S. at 826. The fact that no alternative means of procreation are open to Gerber weighs against a finding that the prohibition is reasonably related to legitimate penological interests. *See Turner,* 482 U.S. at 90.

order to establish their innocence. Gerber's request involves essentially the same procedure; yet, the Warden has failed to explain why Gerber's request is distinguishable. There is no basis for the differing treatment of the two procedures.

The majority cites the "nature and goals of a prison system," but fails to identify even one way in which accommodating Gerber's request would be inconsistent with the legitimate needs of prison facilities. Maj. op. at 7985. The majority identifies correctional goals such as isolating prisoners, deterring crime, punishing offenders, and providing rehabilitation that are supposedly inconsistent with the right to procreate, yet does not explain how the right is inconsistent with any of these goals. If, in fact, the purpose behind prohibiting procreation is to punish offenders, this is a determination that should be made by the legislature, not the Warden. *Cf. Turner,* 482 U.S. at 96 (distinguishing its decision in *Butler v. Wilson,* 415 U.S. 953, (1974), *summarily aff'g Johnson v. Rockefeller,* 365 F. Supp. 377 (S.D.N.Y. 1973), on the basis that the prohibition on marriage in *Johnson* was "part of the punishment for [the] crime," determined by the legislature).

Here, it appears that the California Legislature has made no such determination. No state statute authorizes the Warden's prohibition. The only authority relied on by the Warden to deny Gerber's request is a regulation of the Department of Corrections, Cal. Code Regs. tit. 15, § 3350(a), which provides that prison officials "shall only provide medical services for inmates which are based on medical necessity."[2] Cal Code Regs. tit. 15, § 3350(a). Although the Warden's interpretation of the regulation is entitled to deference, *see People v. Goodloe,* 44 Cal. Rptr. 2d 15, 20 (Ct.

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2. At oral argument, counsel cited Cal. Code Regs. tit. 15, § 3354, which requires that "facility-employed health care staff" provide health care treatment for inmates. The Warden's brief, however, referred to § 3350, and his argument that he is required to provide only medically necessary treatment indicates that he probably means to rely on § 3350. Neither section supports his position.

App. 1995) (granting the Department of Corrections' interpretation of the Penal Code "great weight," unless clearly erroneous or unauthorized); *In re Semons,* 256 Cal. Rptr. 641, 645 (Ct. App. 1989) (applying same principle to the warden and the Department of Corrections' interpretation of a regulation), the regulation on its face does not authorize the Warden's position. Nor is there any state law supporting the Warden's interpretation of § 3350 as granting him authority to prohibit a prisoner from 7596 fathering a child. Section 3350 in no way addresses Gerber's request; it deals with the provision of medical care, and it is not medical care that Gerber seeks. The only request he has made is that prison authorities either mail the package containing the receptacle or permit his lawyer to retrieve it directly from him.

The majority emphasizes that, although California prison officials permit some inmates the privilege of conjugal visits, *see* Cal. Code Regs. tit. 15, § 3174, there is no *right* to such visits. It fails to recognize, however, that permitting conjugal visits gives rise to the strong possibility of procreation ***627** resulting from these conjugal visits for hundreds, if not thousands, of inmates. Thus, permitting conjugal visits gives rise to the question of whether procreation truly is inconsistent with incarceration. If numerous other prisoners are permitted to procreate, how can procreation, per se, be fundamentally inconsistent with incarceration?[3]

The fact that prisoners have no constitutional right to contact visits or conjugal visits while incarcerated is irrelevant to the question of whether the concededly fundamental right to procreate is per se inconsistent with incarceration. The cases cited by the majority denying the right to conjugal visits, Maj. op. at 7588 & n. 1, do not rely on the principle that such visits are fundamentally inconsistent

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3. I emphasize, again, that Gerber is not seeking a conjugal visit. He seeks only to have the prison authorities either mail a package or allow his privately-retained attorney to retrieve it from him.

with incarceration, but on other principles, such as the penological concerns that justify the restriction — an issue the majority does not reach. *See Hernandez v. Coughlin,* 18 F.3d 133, 137 (2d Cir. 1994) (citing the "exigencies and operational considerations of our penal system" in finding no constitutionally protected right to conjugal visits); *Toussaint v. McCarthy,* 801 F.2d 1080, 1113-14 (9th Cir. 1986) (holding that denial of contact visitation did not violate Eighth Amendment and reasoning that such denial is "based on sound penological justifications"); *see also Kentucky Dep't of Corr.,* 490 U.S. 454, 456-65 (1989) (finding that prison regulations governing visitors did not create a liberty interest protected by the due process clause); *Block v. Rutherford,* 468 U.S. 576, 586 (1984) (addressing the "narrow" question of "whether the prohibition of contact visits is reasonably related to legitimate governmental objectives"); *Barnett v. Centoni,* 31 F.3d 813, 817(9th Cir. 1994) (per curiam) (citing *Toussaint* to uphold dismissal of claim of right to contact visitation); *Davis v. Carlson,* 837 F.2d 1318, 1319 (5th Cir. 1988) (per curiam) (stating without explanation that no constitutional right to conjugal visits exists, citing *McCray v. Sullivan,* 509 F.2d 1332 (5th Cir. 1975)); *Bellamy v. Bradley,* 729 F.2d 416, 420 (6th Cir. 1984) (stating that "[l]imitations upon visitation may be imposed if they are necessary to meet penological objectives such as the rehabilitation and the maintenance of security and order"); *Montana v. Comm'rs Court,* 659 F.2d 19, 21-22 (5th Cir. Unit A Sept. 1981) (per curiam) (citing *McCray* to hold that there is no constitutional right to conjugal visits, and stating that contact visits may be denied for legitimate security reasons); *Ramos v. Lamm,* 639 F.2d 559, 580 n. 26 (10th Cir. 1980) (stating only that "we think the weight of present authority clearly establishes that there is no constitutional right to contact visitation"); *Lynott v. Henderson,* 610 F.2d 340, 342 (5th Cir. 1980) (although there is no constitutional right to visitation, limitations may be imposed "only if they are necessary to meet legitimate penological objectives"); *Oxendine v. Williams,* 509 F.2d 1405, 1407 (4th Cir. 1975) (per curiam) (stating without

explanation or citation that the prisoner "has no constitutional right to physical contact with his family"); *McCray,* 509 F.2d at 1334 (stating that conjugal visits are not a constitutional right because visitation privileges are "a matter subject to the discretion of prison officials"); *Payne v. Dist. of Columbia,* 253 F.2d 867, 868 (D.C. Cir. 1958) (per curiam) (upholding without explanation the district court's dismissal for failure to state a claim a prisoner's ***628** due process claim regarding conjugal visits). Not one of the cases cited by the majority addresses the question of whether a fundamental right, such as procreation, is per se inconsistent with incarceration.

Because the majority points to no facts in the record to support the conclusion that procreation is fundamentally inconsistent with incarceration, its position essentially rests on the "impression" that prisoners simply should not have the right to procreate by artificial insemination. *Goodwin v. Turner,* 702 F. Supp. 1452, 1454 (W.D. Mo. 1988), *aff'd,* 908 F.2d 1395 (8th Cir. 1990). However, "[n]either prisons nor courts should deny a reasonable request for the exercise of a constitutional right simply because it is novel." *Goodwin,* 908 F.2d at 1407 (McMillian, J., dissenting). The majority's vague references to penological needs fail to support the conclusion that the right to procreate is fundamentally inconsistent with incarceration.[4]

The majority relies on an extremely narrow reading of *Skinner,* limiting it to the proposition that forced surgical sterilization of prisoners violates the Equal Protection Clause, Maj. op. at 7589-90, and ignoring the basis of that holding, which is the fundamental importance of the right to procreate. In fact, as in *Skinner,* the denial of Gerber's request does mean that Gerber "is forever deprived of a basic liberty," *Skinner,* 316 U.S. at 541, and to deprive him of that basic liberty without so much as one fact to support the

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4. Indeed, it is difficult to square the Warden's allowance of private medical examinations at which blood, urine, and stool samples may be taken with the restriction at issue.

deprivation is an "exaggerated response" to vague penological objectives, *Turner*, 482 U.S. at 98.

The majority relies on *Goodwin* to state that there is no comparison between sterilization and denial of the facilitation of artificial insemination. Maj. op. at 7590. That statement in *Goodwin*, however, was made in the context of the district court's reasoning that the denial would not permanently deprive the petitioner of the opportunity to father a child. *See Goodwin*, 702 F. Supp. at 1454 (distinguishing *Skinner* on the basis that it involved a permanent deprivation, "rather than a mere delay"). Unlike *Goodwin*, the deprivation in the instant case is permanent. Furthermore, in *Goodwin*, the petitioner was seeking "the facilitation of artificial insemination," in the sense that the prisoner was asking for the prison to provide him with a clean container and the means to transport the container. *Id.* By contrast, Gerber has made every arrangement to facilitate the process, having contacted the laboratory himself and asking the prison only to mail the package. Allowing this procedure would implicate no concerns different from allowing a prisoner to submit bodily fluids to a forensic laboratory to establish his innocence. The majority's "bald assertions of security interests will not justify the loss of a prisoner's fundamental rights." *Bradbury v. Wainwright*, 718 F.2d 1538, 1543 (11th Cir. 1983).

After taking a narrow view of *Skinner*, the majority proceeds to take an extremely broad view of *Turner*, expanding the meaning of one sentence in *Turner* to justify its conclusion. As noted above, the Court's statement that inmate marriages are formed "in the expectation that they ultimately will be fully consummated," *Turner*, 482 U.S. at 96, "[b]y no stretch of the imagination," Maj. op. at 7590, is an expression of the Court's view that the fundamental right to procreate is per se inconsistent with incarceration. On the contrary, as the majority notes, this is merely a recognition that ***629** "the physical aspects" of marriage do not survive incarceration because of the limitations on privacy necessary to incarceration. Maj. op. at 7590. Gerber's request does *not*

involve "the physical aspects" of marriage. He asks only that prison officials either mail the package or allow his lawyer to retrieve it from him.

Vague incantations about the restrictions incarceration places upon privacy, intimate association, and the marriage relationship in general do not support such a broad prohibition on a right as fundamental as procreation. The majority has offered no explanation as to how Gerber's request in any way implicates the rights that are necessarily restricted by incarceration. The record before us does not offer any basis on which to conclude that Gerber's request is inconsistent with incarceration. What this case requires is a factual record from which it can be determined whether exercise of the right to procreation *simpliciter* is fundamentally inconsistent with incarceration and whether any penologically-justified reason exists to justify the Warden's denial of Gerber's request. For these reasons, I would vacate the district court's order dismissing the case for failure to state a claim and remand for further proceedings, including an evidentiary hearing to determine whether legitimate penological concerns justify this restriction. I therefore respectfully dissent.

KOZINSKI, Circuit Judge, with whom Judges PAEZ and BERZON join, dissenting:

The majority hinges its opinion on the proposition that "the right to procreate is fundamentally inconsistent with incarceration," Maj. Op. at 7584, but does not explain how. Let's consider the possibilities. Gerber asks for permission to:

1. Ejaculate
2. into a plastic cup, which is then to be
3. mailed or given to his lawyer
4. for delivery to a laboratory
5. that will try to use its contents to artificially inseminate

Mrs. Gerber.

I gather that the first step of this process is not fundamentally inconsistent with incarceration and prison guards don't patrol cell blocks at night looking for inmates committing Onan's transgression. Similarly, the prison has no penological interest in what prisoners do with their seed once it's spilt; a specimen cup would seem to be no worse a receptacle, from the prison's point of view, than any other.

Nor is there anything remotely inconsistent with incarceration in mailing a package, or handing it to your lawyer. Sure, the prison is entitled to make sure it doesn't contain prison escape plans, but Gerber is not claiming an exemption from routine security checks. That a package contains semen, rather than a book or an ashtray or some other such object, would seem to make no rational difference from the prison's point of view.

Once the package is outside prison walls, the prison's legitimate interest in it is greatly diminished. That it is to be delivered to a laboratory, rather than to any other willing recipient, seems to make no difference to prison authorities; certainly they have offered no proof that it does. Nor, I would think, does the prison have a legitimate interest in what the recipient does with the package. Whether it is used to inseminate Mrs. Gerber, to clone Gerber or as a paperweight has no conceivable effect on the safe and efficient operation of the California prison system.

Thus, what Gerber seeks to do is not inconsistent with incarceration the way it would be if he wanted to carry a Glock or conduct nuclear fission experiments in his cell. Production of the semen and delivery *630 to a laboratory neither compromises security, nor places a strain on prison resources beyond that required to mail any other package.

Perhaps the majority is talking about a different kind of inconsistency altogether. Prison is meant to deny inmates certain rights enjoyed by free people; loss of those rights is the punishment. It would be inconsistent with Gerber's status as an inmate for him to vacation in Paris or spend the

weekend at home, because the very point of incarceration is to deny prisoners freedom of movement and the comforts of home. When the legislature imposes imprisonment as punishment for a crime, it necessarily curtails all those other rights that require freedom of physical movement for their exercise.

Is procreation one of those rights the exercise of which is inconsistent with the prisoner's loss of his freedom of locomotion? Apparently not, at least as Gerber proposes to exercise it. Gerber is not asking to go home for a conjugal visit, nor to enjoy such a visit within the prison; he does not seek to loosen the strictures of his confinement in the least. Gerber asks only to engage in activities that prisoners are already free to engage in (see steps 1-3 above). That these activities might result in the creation of a life outside prison walls is no more inconsistent with Gerber's status as a prisoner than is any other consequence of mailing materials from prison to the outside world. Thus, a prisoner might become a best-selling author by sending out a manuscript for a novel or biography. *See, e.g.*, O.J. Simpson, *I Want to Tell You* (1995); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991). Or, he might be a graphic artist who sells his work by mail. *See* Michael Wayne Hunter, *Merchants of Death*, Orange Coast, Feb. 1995, at 80, 82-83, *available at* http:// www.compusmart.ab.ca/ deadmantalking/mhmerchant.htm (describing California death row prisoners who sell artwork). Or, as Judge Tashima points out, he might send out bodily fluids that result in proving his innocence. *See* Tashima Dissent at 7595. These activities may give the prisoner great wealth and satisfaction, or may even result in his release from prison, but they are not inconsistent with his status as a prisoner because the physical acts required to accomplish them are entirely consistent with incarceration.

This would be a different case if the legislature of California had ordained that prisoners must lose the right to procreate as punishment for their crimes, in addition to loss of physical liberty. *See Turner v. Safley*, 482 U.S. 78, 96 (1987)

(distinguishing *Butler v. Wilson*, 415 U.S. 953 (1974), in part because "importantly, denial of the right [to marry] was part of the punishment for crime"). But the legislature did no such thing. The statute pursuant to which Gerber was incarcerated merely provides for "imprisonment"; it says nothing about abrogating additional rights. *See* Cal. Penal Code § 667. When the California legislature wants to remove additional rights, such as the right to vote, it knows how to do so. *See* Cal. Elec. Code § 2212.

Nevertheless, could it be that, by ordering imprisonment, the legislature also *implicitly* cut off a prisoner's right to procreate? Even under the best of circumstances, this would be a difficult argument for the state to make, because the term "imprisonment" carries no plausible implication as to any rights other than those necessarily abridged by physical incarceration. Once we started walking down this road, where would we stop? Does the term "imprisonment" also implicitly ***631** abridge the right to speak? Or the right to own property? The right to marry? To practice a religion? Absent some very compelling evidence of legislative intent, I am reluctant to conclude that, when the legislature uses a term meaning "defendant shall be locked up in a cell," it also implicitly cuts off other fundamental rights that can be exercised despite such incarceration.

But these are not the best of circumstances for the state to make this argument because we know for a fact that, by using the term "imprisonment," the legislature of California did *not* intend to cut off a prisoner's right to procreate. How do we know this? Because the California Department of Corrections, the agency charged by the legislature with administering the prison system, *see* Cal. Penal Code § 5054, has so interpreted the term "imprisonment." Title 15, section 3174 of the California Administrative Code provides that some prisoners (not including Gerber) are entitled to conjugal visits. Obviously, some of these visits will result in procreation. If "imprisonment" under California law abrogates the right to

procreate, the Department of Corrections could not, by regulation, restore that right, just as it could not restore the right taken away by California Election Code § 2212 by setting up voting booths in the prison yard. By making arrangements for conjugal visits, the Department of Corrections must have concluded that imprisonment does *not* cut off a prisoner's right to procreate. We are required to defer to state agencies in their interpretation of the law they are charged with administering, *see Clallam County v. Dep't of Transp.*, 849 F.2d 424, 429 (9th Cir. 1988), and so we must accept the Department of Corrections' entirely reasonable interpretation of the term "imprisonment," as not cutting off the right to procreate.

So we have no explicit, or even implicit, decision by the state legislature that imprisonment means loss of the right to procreate; there is no statute or regulation on point. And, as we have seen, there is also nothing inherently inconsistent about the mechanics of procreation--at least as Gerber proposes to practice them--that would compromise prison security, unduly burden prison resources or otherwise interfere with the safe and efficient operation of the California prison system.

What then is left? It is nothing more than the ad hoc decision of prison authorities that Gerber may not procreate. But, as the majority seems to admit, and as *Griswold v. Connecticut*, 381 U.S. 479 (1965), clearly holds, procreation (at least within the marital relationship) is a fundamental right. Such a right may be abrogated only pursuant to lawful authority and for compelling reasons. The reasons here must be particularly strong because the burden of this prohibition falls not only on Gerber but also on Mrs. Gerber, who is precluded from bearing a child fathered by her husband. As the Supreme Court noted in *Turner*, when a prison regulation creates a "consequential restriction on the [constitutional] rights of those who are *not* prisoners," it will be subjected to more searching scrutiny than when the burden falls only on inmates. *Turner*, 482 U.S. at 85 (quoting *Procunier v. Martinez*, 416 U.S. 396, 409 (1974), *overruled on*

other grounds by Thornburgh v. Abbott, 490 U.S. 401, 413-14 (1989)).

The majority suggests that abrogating the right to procreate serves the goals of "isolating prisoners, deterring crime, punishing offenders, and providing rehabilitation." Maj. Op. at 7589; *id.* at 7587 ("deterrence and retribution," quoting *Hudson* ***632** *v. Palmer,* 468 U.S. 517, 524 (1984)). But such judgments must be made by the legislature in setting the nature and degree of punishment for particular crimes. Prison administrators may not supplement the punishment imposed by the legislature because they believe doing so would enhance "deterrence and retribution." By cutting off Gerber's fundamental right to procreate, prison authorities have enhanced Gerber's punishment beyond that authorized by statute, and consigned Mrs. Gerber to a childless marriage. These are rights far too important to be abrogated based on nothing more than the personal opinion of prison bureaucrats that we would be better off as a society if the Gerbers were prevented from parenting an offspring. For these reasons, and those stated by Judge Tashima, I respectfully dissent.

(277 F.3d 843)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILLIAM GERBER, Plaintiff-Appellant,
v.
RODNEY HICKMAN, Warden, Defendant-Appellee.

No. 00-16494.
D.C. No. CV-99- 01315-FCD.

Filed December 4, 2001

ORDER

Before: SCHROEDER, Chief Judge.

Upon the vote of a majority of nonrecused regular active judges of this court, it is ordered that this case be reheard by the en banc court pursuant to Circuit Rule 35-3. The three-judge panel opinion shall not be cited as precedent by or to this court or any district court of the Ninth Circuit, except to the extent adopted by the en banc court.

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264 F.3d 882

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILLIAM GERBER, *Plaintiff-Appellant,*
v.
RODNEY HICKMAN,* WARDEN, *Defendant-Appellee.*

No. 00-16494.
D.C. No. CV-99- 01315-FCD.

Appeal from the United States District Court for the Eastern District of California;
Frank C. Damrell, Jr., District Judge, Presiding.

Argued and Submitted
Dec. 13, 2000—San Francisco, California

Filed Sept. 5, 2001

Before: Myron H. Bright,** Stephen Reinhardt, and Barry G. Silverman, Circuit Judges.

Opinion by Judge Bright;
Dissent by Judge Silverman

COUNSEL

*883 Teresa L. Zuber, Sacramento, California, for the appellant.

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* Defendant Roderick Hickman was erroneously named as Rodney Hickman.

** The Honorable Myron H. Bright, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

Bill Lockyer, Attorney General, David P. Druliner, Chief Assistant Attorney General, Paul D. Gifford, Senior Deputy Attorney General, John M. Appelbaum, Supervising Deputy Attorney General, and Gregory S. Walston, Deputy Attorney General, Sacramento, California, for the appellee.

OPINION

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BRIGHT, Circuit Judge:

William Gerber, a prisoner incarcerated in the State of California, appeals from a judgment in the district court dismissing his complaint for failure to state a claim upon which relief can be granted pursuant to FED. R. CIV. P. 12(b)(6). The complaint presents a claim under 42 U.S.C. § 1983 for alleged violation of his substantive due process rights and under California state law for alleged violation of his statutory rights. In the complaint, Gerber alleges that the California Department of Corrections ("CDC") denied his fundamental right to procreate in violation of the Fourteenth Amendment guarantee of substantive due process. On appeal, Gerber principally contends that the district court erred in concluding that the right to procreate does not survive incarceration. The district court did not reach the question of whether the prison may restrict Gerber's exercise of that right in the manner in which he seeks to exercise it (i.e. by artificial insemination). We conclude that the right to procreate survives incarceration and that the factually unsupported arguments put forth by the Warden as legitimate penological reasons to restrict Gerber's exercise of his right to procreate are insufficient to justify dismissal of the complaint. Accordingly, we **REVERSE** and **VACATE** the dismissal and **REMAND** for further proceedings.

I. BACKGROUND[1]

This case concerns a life-term prisoner's effort to have a child by artificially inseminating his wife. Artificial insemination is a noncoital process in which semen is collected from a man under laboratory conditions and then introduced into a woman's body with a needleless hypodermic syringe at a favorable time in her ovulation cycle. *See generally* Katheryn D. Katz, *The Clonal Child: Procreative Liberty and Asexual Reproduction,* 8 Alb. L.J. Sci. & Tech. 1, 23 (1997); Katheleen R. Guzman, *Property, Progeny, Body Part: Assisted Reproduction and the Transfer of Wealth,* 31 U.C. Davis L. Rev. 193, 202 (1997) (noting a conservative estimate that there have been more than 500,000 children conceived by artificial insemination in the United States).

Appellant William Gerber desires to artificially inseminate his wife because his particular circumstances disallow the "natural" method of procreation. Gerber was sentenced to 100 years to life imprisonment plus eleven years pursuant to California's three strikes law, Cal. Penal Code § 667, after his 1997 conviction for discharging a firearm and making terrorist threats. Prior to his conviction, he and his now forty-six-year-old wife wished to conceive a child. However, he is constrained in employing the usual methods for achieving this goal because he is a life-term prisoner incarcerated in California, and, under CDC regulations, conjugal visits are prohibited for inmates "sentenced to life without the possibility of parole [or] sentenced to life, without a parole date established by the Board of Prison Terms." CAL. CODE REGS. tit. 15, § 3174(e)(2). Given Gerber's sentence and his wife's age, he alleges that artificial insemination is the only method by which they can conceive a child together.

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1. When we review an order dismissing a claim pursuant to a Rule 12(b)(6) motion, we must view the relevant facts in the light most favorable to the plaintiff. *Lee v. City of Los Angeles,* 250 F.3d 668, 679 (9th Cir.2001).

*885 Gerber requested that prison authorities permit him to provide a semen specimen to a laboratory so that his wife may be artificially inseminated with it. According to Gerber, the University Andrology Laboratory and Sperm Bank at the University of Illinois at Chicago Medical Center would mail him a packet containing a plastic receptacle and a postage-paid return mailer. Then, Gerber would ejaculate into the receptacle, place it into the return mailer, and send it by overnight mail back to the laboratory. Gerber's privately retained lawyer offered to retrieve the return mailer directly from Gerber if prison authorities do not want Gerber to place it in the mail himself. Gerber does not object to the inspection of his return package in accordance with the prison's usual procedures. Furthermore, Gerber and his wife are willing to bear all of the costs necessary to facilitate the specimen collection, including paying for a licensed physician to come on the premises to oversee the procedure. The prison denied his request after determining that the procedure was not medically necessary and that Gerber as a prisoner had not shown that the CDC had violated any of his constitutional rights.

This case has a complicated procedural history. On July 8, 1999, following denial of his request and exhaustion of his administrative remedies, Gerber filed an application for a writ of habeas corpus, construed by the district court as a civil action alleging violation of Gerber's civil rights, against the Warden of the Mule Creek State Prison where he was incarcerated.[2] By order dated September 9, 1999, the district court dismissed Gerber's action with leave for Gerber to file an amended complaint alleging a violation of 42 U.S.C. § 1983.

On October 7, 1999, Gerber filed the amended complaint, naming Warden Rodney Hickman as the sole defendant and seeking injunctive relief. In the complaint, he alleged that the Warden's policy violated his constitutional

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2. During the pendency of this action Gerber was transferred to the California State Prison in Lancaster.

right to procreate under the Due Process Clause of the Fourteenth Amendment and his statutory rights as a California prisoner guaranteed by CAL. PENAL CODE §§ 2600 and 2601. The parties consented, under 28 U.S.C. § 636(c), to conduct all proceedings before Magistrate Judge John F. Moulds. On January 5, 2000, the Warden moved to dismiss the complaint pursuant to FED R. CIV. P. 12(b)(6), for failure to state a claim upon which relief can be granted, or, alternatively, for summary judgment, on the basis that the right to procreate does not survive incarceration and that, even if it did, the restriction on artificial insemination is reasonably related to the legitimate penological goals of treating male and female inmates equally to the extent possible, conserving prison resources, maintaining institutional security interests, and preserving inmates' rehabilitation.

The magistrate judge heard oral argument on the Warden's motion on March 2, 2000. On March 7, 2000, the magistrate judge filed findings and recommendations, recommending denial of the Warden's motion to dismiss and denial of both parties' motions for summary judgment without prejudice. The magistrate judge found that the Warden failed to establish as a matter of law that the right to procreate does not exist during incarceration, that an inquiry into both the practical aspects of restrictions that arise as a consequence of *886 an individual's status as a prisoner and the legitimate penological objectives of the corrections system is best undertaken on a fully developed factual record and not on a motion to dismiss, and that Gerber made a substantial showing that numerous facts are disputed underlying the determination of legal issues, thus obviating summary judgment dismissal.

Subsequently, the district court rejected the magistrate judge's findings and recommendations and dismissed the complaint for failure to state a claim upon which relief can be granted. The district court made no ruling on the motion for summary judgment. On June 23, 2000, the district court filed an amended memorandum and

order and entered judgment that same day. The district court concluded that:

> Whatever right plaintiff has to artificial insemination, it does not survive incarceration.

Gerber v. Hickman, 103 F.Supp.2d 1214, 1218 (E.D. Cal.2000). Gerber appealed.

II. JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction over the district court's judgment pursuant to 28 U.S.C. § 1291.

We review the district court's dismissal for failure to state a claim de novo. *Wright v. Riveland,* 219 F.3d 905, 912 (9th Cir. 2000). "[A] complaint should not be dismissed unless it appears beyond a doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* (quoting *Steckman v. Hart Brewing, Inc.,* 143 F.3d 1293, 1295 (9th Cir. 1998)).

III. DISCUSSION

A. Section 1983 Claim

To successfully bring a claim under 42 U.S.C. § 1983, Gerber must establish that (1) the conduct complained of was committed by a person acting under color of state law, and (2) the conduct deprived [Gerber] of a constitutional right. *L.W. v. Grubbs,* 974 F.2d 119, 120 (9th Cir. 1992).

The parties do not dispute that Defendant-Appellee Warden Hickman is a state actor. Our focus, therefore, must be on whether Warden Hickman deprived Mr. Gerber of a right or interest granted by the Constitution.

In urging this court to reverse the district court's dismissal, Gerber asserts that he set forth a violation of his substantive due process rights by the CDC and that the

district court erred in its determination that the fundamental right to procreate does not survive incarceration.[3]

We must undertake a two step analysis to determine whether Gerber's substantive due process rights were violated. First, we must determine whether there is a fundamental right involved (in this case, the right to procreate) and whether that fundamental right is not "inconsistent with [Gerber's] status as a prisoner." *Pell v. Procunier*, 417 U.S. 817, 822 (1974). Second, if we decide that the fundamental *887 right at issue survives incarceration, we then ask whether there are legitimate penological interests which justify the prison's restriction of the exercise of that fundamental right. *See Turner v. Safley*, 482 U.S. 78, 96-97 (1987).

The Supreme Court has recognized a fundamental constitutional right to procreate on several occasions. *Carey v. Population Servs. Int'l*, 431 U.S. 678, 684-85 (1977) ("It is clear that among the decisions that an individual may make without unjustified government interference are personal decisions 'relating to marriage ... [and] procreation.' ") (internal citations omitted); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) ("The rights to conceive and to raise one's children have been deemed 'essential' . . . [and] 'basic civil rights of man.' ") (internal citations omitted); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (stating that legislation deprived individuals "of a right which is basic to the perpetuation of a race—the right to have offspring"). The

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3. The district court concludes in part that a prisoner does not have a fundamental right to artificial insemination. *Gerber*, 103 F. Supp. 2d at 1218. The district court erred in its framing of the fundamental right involved in this case. The question of whether a prisoner retains a fundamental right to procreate while in prison is a different question than whether a constitutional right to artificial insemination exists and survives incarceration. The district court goes on to state that "during incarceration a prisoner loses his or her right to access to a means of procreation." *Id.* at 1219. We take this statement to mean that the district court concluded that the fundamental right to procreation is inconsistent with imprisonment and, thus, does not survive incarceration.

right to procreate has been recognized in a number of other cases outside the prison context.[4] The question raised in this case is whether this fundamental right survives incarceration; that is, whether the fundamental right of procreation exists for prisoners during their term of imprisonment.

We apply a distinct constitutional analysis to cases involving prisoner rights. Because "[n]o iron curtain separates" prisoners from the Constitution, *Hudson v. Palmer*, 468 U.S. 517, 523 (1984) (internal citation omitted), a prisoner "retains those [constitutional] rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system." *Pell v. Procunier*, 417 U.S. 817, 822 (1974). The Supreme Court has held that some constitutional rights survive incarceration. *See, e.g., O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987) (affirming free exercise of religion retained during incarceration); *Bounds v. Smith*, 430 U.S. 817 (1977) (affirming access to courts retained); *Estelle v. Gamble*, 429 U.S. 97 (1976) (holding prisoners have right of protection against cruel and unusual punishment); *Wolff v. McDonnell*, 418 U.S. 539 (1974) (holding prisoners have protections of due process clause); *Pell*, 417 U.S. 817 (affirming right of free speech retained).

In this case, the district court determined that "during incarceration a prisoner loses his or her right to access to a means of procreation, be it conjugal visits, artificial insemination, *in vitro* fertilization, etc." *Gerber*, 103 F. Supp. 2d at 1219. The district court cited two other district court opinions in support of this proposition. The cited

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4. *See Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992) (concerning right to an abortion); *Carey v. Population Services Int'l*, 431 U.S. 678, 685 (1977) (finding right of minors to have access to birth control); *Cohen v. Chesterfield County Sch. Bd.*, 414 U.S. 632, 640 (1974) (concerning right of school teacher not to be fired for becoming pregnant); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (holding right of unmarried individuals to have access to birth control); *Stanley v. Illinois*, 405 U.S. 645, 651-52 (1972) (concerning right of unmarried father to have custody of his child after death of child's mother).

cases, however, do not serve as binding precedent for our decision, nor do *888 we find them particularly probative.[5] Contrary to the district court's conclusion, we hold that the right to procreate does indeed survive incarceration.6

No case has directly addressed whether the right to procreate is a right that prisoners possess during their time in prison. There are a few cases, however, that shed light on the question. In *Turner v. Safley*, 482 U.S. 78 (1978), the Supreme Court established that the right to marry survives incarceration. *Id.* at 96. The Court stated that prisoner marriages are included within the fundamental right to marry and that, although certain aspects of marriage could not exist in a prison setting (e.g. cohabitation), sufficient attributes of marriage remained to conclude that the right to marry continues within the prison walls. *Id.* at 95-96

Although the Supreme Court has not yet decided whether the right to procreate survives incarceration, in *Skinner v. Oklahoma*, the Supreme Court stated that prisoners have a constitutional right to maintain their procreative

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5. *Anderson v. Vasquez*, 827 F. Supp. 617, 620 (N.D. Cal. 1992), was reversed on appeal in an unpublished disposition by this court on the ground that the portion of the decision regarding the right to procreate in prison was not ripe for adjudication. In *Goodwin v. Turner*, 702 F. Supp. 1452, 1454 (W.D. Mo. 1988), although the district court stated that the right did not survive incarceration, the Eighth Circuit on appeal assumed, but did not decide that, the right to procreate was consistent with the status of imprisonment. The court then affirmed on the basis that the regulation at issue was reasonably related to legitimate penological interests. *See Goodwin v. Turner*, 908 F.2d 1395, 1398 (8th Cir. 1990).

6. The dissent is incorrect when it states that we conclude that a prisoner has a constitutional right "to mail his semen from prison so that his wife can be artificially inseminated" or "to procreate from prison via FedEx." We do no such thing. As we make clear, the general fundamental right to procreate, well-recognized by the federal courts, is the right we hold to survive incarceration, not a more narrow manifestation of that right involving a particular means of procreation. The narrower issue is one that can be answered only after a record is developed and an examination can be conducted of the penological reasons, if any, for prohibiting the particular conduct at issue.

abilities for use once released from custody.[7] [FN7] *Skinner*, 316 U.S. at 536. The Supreme Court struck down Oklahoma's Habitual Criminal Sterilization Act, legislation which authorized the sterilization of persons convicted three times of a felony involving moral turpitude. *Id.* at 541 (invalidating statute on equal protection grounds). The Court stated that

> We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear. There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury.

Id. While *Skinner* stands for the proposition that a prisoner has a fundamental right to procreation *following* his incarceration and therefore his ability to procreate ***889** may not be destroyed, the decision's emphasis on the fundamental notion of the right to procreate lends support to the idea that prisoners retain some form of procreative rights while in prison.

Taken together, *Turner* and *Skinner* suggest that the fundamental right of procreation may exist in some form while a prisoner is incarcerated, despite the fact that a

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7. In cases involving family and marital rights outside the prison context, *Skinner* has been cited as standing for the proposition that procreation is a fundamental right and that choices surrounding when and whether to have children are protected by the Constitution. *See, e.g., Carey*, 431 U.S. at 685; *Cleveland Bd. of Educ.*, 414 U.S. at 639-40; *Eisenstadt*, 405 U.S. at 453; *Stanley*, 405 U.S. at 651.

prisoner necessarily will not be able to exercise that right in the same manner or to the same extent as he would if he were not incarcerated.[8] *Turner* stands as an example of how a right related to marriage and family may be exercised in prison despite a prisoner's inability to carry out the "typical" marriage while in prison. *Skinner* states that, at a minimum, a prisoner while in prison cannot be deprived of his ability to procreate upon release, which in turn tends to support the notion that a person's procreative rights survive while he is in prison. The specific question, however, whether the right of procreation is *temporarily* extinguished simply by virtue of the fact of incarceration is a matter of first impression for this circuit.[9] Indeed, no circuit court has yet answered that question.[10]

The issue of procreation while in prison has arisen in the context of prisoners' requests for conjugal visits. In *Hernandez v. Coughlin,* 18 F.3d 133 (2d Cir. 1994), the Second Circuit held that "[t]he Constitution . . . does not create any protected guarantee to conjugal visitation privileges while incarcerated." *Id.* at 137. However, the language in the opinion suggests that the court intended to reject the narrow right to conjugal visitation without denying the possibility

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8. Another case which supports the concept that procreative rights survive incarceration is the Third Circuit's decision in *Monmouth County Corr. Inst. Inmates v. Lanzaro,* 834 F.2d 326 (3d Cir. 1987). The court did not question whether the right to choose to have an abortion survived incarceration. *Id.* at 335. After stating that a woman has a fundamental right to choose to terminate her pregnancy, the court proceeded directly to determining whether the prison had compelling reasons to restrict the exercise of that right. *Id.*

9. Of course, in Gerber's case, the word "temporary" is not true in the practical sense, since, barring exceptional circumstances, he is serving a life sentence.

10. *See Goodwin v. Turner,* 908 F.2d 1395 (8th Cir. 1990) (assuming existence of such a right, but upholding regulation at issue on the ground that it was reasonably related to legitimate penological interests). *Cf. id.* at 1402 (McMillan, J., dissenting) (stating that "there is little question that the procreative right survives incarceration" and basing its holding on *Turner, Skinner,* and *Monmouth County*).

that a broader right to procreate survives incarceration. The court stated that Hernandez argued for a "right to marital intimacy . . . derived from the fundamental rights of marriage and procreation." *Id.* at 136. The court went on to state that "Hernandez's understanding of these two rights is misguided" and subsequently held that there was no protected right to conjugal visitation. *Id.*

It is unclear how much of the *Hernandez* court's determination regarding the existence of the right to conjugal visits was intertwined with its consideration of penological concerns. The court stated: "Rights of marital privacy, like the right to marry and procreate, are necessarily and substantially abridged in a prison setting." *Id.* at 137. This language suggests, contrary to the district court's position, that the right to procreate survives incarceration but that the exercise of that right can be restricted for legitimate penological reasons. We have no quarrel with that proposition.

Similarly, in *Toussaint v. McCarthy*, 801 F.2d 1080 (9th Cir. 1986), this court dismissed ***890** a prisoner's claim of a constitutional right to contact visitation. *Id.* at 1113 (finding denial of contact visits does not violate 8th amendment). However, again it is not clear whether we based our holding on the argument that the "right to contact visitation" did not survive incarceration or on the argument that the right did survive but that its exercise could be restricted by the prison authorities. The court stated that "the district court's findings indicate that denial of contact visitation is based on sound penological justifications." *Id.* at 1114.

Other courts have also stated that there is no constitutional right to contact visitation while simultaneously framing the discussion in terms of legitimate restrictions on a prisoner's exercise of his rights. *See, e.g., Bellamy v. Bradley*, 729 F.2d 416, 420 (6th Cir. 1984) (stating that although prisoners have no absolute constitutional right to visitation, restrictions on that right must be "necessary to meet penological objectives"); *Lynott v. Henderson*, 610 F.2d 340, 342 (5th Cir. 1980) (same); *Bazzetta v. McGinnis*, 902 F.

Supp. 765, 769-70 (E.D. Mich. 1995) (stating that prisoners' right to association is not "absolute [or] unfettered" and that first amendment rights are "necessarily curtailed by confinement").

The contact visitation and conjugal visit cases do not in any event preclude our finding that the right to procreate survives incarceration. The recognition that a general right to procreate exists during periods of imprisonment is not inconsistent with a holding that there is no specific right to conjugal or contact visits during such times, nor with the idea that a prison can restrict the exercise of the right to procreate in regard to conjugal visitation (a restriction similar to that on the right of association). Procreation that results from the employment of recently developed methods or techniques that bypass physical contact with the prisoner's spouse is not inherently inconsistent with one's status as a prisoner. In fact, even conjugal visits and childbirth are not inherently inconsistent with such status, as the experience in California's prisons demonstrates. *See* Cal. Code Regs. tit. 15, § 3174 (2001) (regulation regarding family overnight visits for prisoners); Cal.Code Regs. tit. 15, § 3074.3 (rehabilitation program for parenting or pregnant prisoners); *see also In re Cummings*, 640 P.2d 1101, 1101 (Cal. 1982) (discussing prison's overnight family visitation policy); *In re Monica C.*, 36 Cal. Rptr.2d 910, 911 (Cal. Ct. App. 1995) (discussing appellant's birth of child in prison).

In sum, we conclude that the fundamental right to procreate survives incarceration. The exercise of that right by Gerber is, however, subject to restriction based on legitimate penological interests. The next question, therefore, is whether the existing prison regulation prohibiting artificial insemination is reasonably related to such interests.[11] *See Turner*, 482 U.S. at 96-97.

In support of his argument for dismissal of Gerber's

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11. The district court failed to reach this prong of the analysis, after concluding that the right to procreate did not survive incarceration. *Gerber*, 103 F. Supp. 2d at 1219.

claim, the Warden cites three governmental interests that he claims are furthered by the policy of denying inmates the right to provide semen to their spouses for artificial insemination: the policy of treating men and women prisoners the same, when possible; safety risks caused by prisoners collecting semen; and concerns about the cost of litigation relating to the procedure.

***891** First, the Warden argues that permitting men to provide semen for artificial insemination would hamper the prison's efforts to treat male and female prisoners similarly. He notes that if men were afforded this opportunity, women would seek to be artificially inseminated, and granting women such an opportunity would lead to "obvious" and "prohibitive" burdens. The Warden's equal protection argument assumes matters not before the court or in the limited record.[12]

Further, Gerber does not seek to *be* artificially inseminated. That right, to be artificially inseminated, which certainly would apply to women, does not apply to Gerber or other male prisoners. The two sexes are not similarly situated here. In this case, we cannot ignore the biological differences between men and women. *Cf. Nguyen v. INS,* 121 S. Ct. 2053, 2066 (2001) (holding no equal protection violation and acknowledging women's and men's most basic biological differences). *But see Goodwin v. Turner,* 908 F.2d 1395, 1400 (8th Cir. 1990) (holding that Warden's desire to treat men and women prisoners equally justified a rule preventing male prisoners from donating their sperm). Women cannot avail themselves of the opportunity Gerber narrowly seeks--to provide a semen specimen to his mate so that she can be artificially inseminated--and men cannot do what Mrs. Gerber is likely capable of doing--conceive and give birth to a child after receiving sperm from a marital partner. Therefore, the policy of treating inmates "equally to the extent possible" is not implicated. The Warden's

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12. On remand, the parties are free to move for summary judgment again on the basis of an amplified record.

argument is rejected in the context of a FED. R. CIV. P. 12(b)(6) dismissal.[13]

Next, the Warden argues that the procedure for collecting semen would create an unacceptable risk that prisoners would misuse their semen by either throwing their bodily fluids on others (a process called "gassing"), or sending their semen through the mail to individuals who do not want it. These concerns are argumentative only, in the context of a motion for dismissal under Rule 12(b)(6) and the lack of a full record. Gerber apparently has offered to pay for medical supervision of the procedure for collecting his semen specimen and Gerber's private lawyer has offered to pick up the laboratory mailer from the prison. The district court on remand can consider on an appropriate record the Warden's contentions in light of *Turner*.

Lastly, the Warden asserts that permitting a prisoner to provide a semen specimen would create an unacceptable risk of liability for the prison, either because of mishandling of the specimen by prison authorities or suits by women inmates seeking to be artificially inseminated. The argument that women prisoners would assert their Equal Protection rights to challenge the denial of an opportunity for artificial insemination, thereby imposing on prisons the burden of defending against such suits, cannot justify denying men their constitutional right to procreate. It is simply impermissible to restrict the constitutional rights of one group because of fear that another group will assert its constitutionally protected rights as well. Moreover, it is generally reprehensible to *892 suggest that restricting protected fundamental constitutional rights is justified by fear of increasing a party's liability.[14]

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13. A more apt parallel may be the question of whether a woman prisoner has the right to donate an egg to her lesbian partner or to a surrogate mother. The Warden has put forth no evidence that this procedure has been requested by any prisoner, that it would be a burden on the prison, or that these two procedures are similar enough as to raise equal protection concerns.

14. There may be increased administrative costs with allowing the

We conclude that, on the basis of the record before us, none of the rationales offered by the Warden falls within *Turner*'s proscription--that the prison may only deny a constitutional right if the regulation is "reasonably related to legitimate penological interests." *Turner*, 482 U.S. at 89. The *Turner* court discusses several factors that are relevant in determining the reasonableness of a regulation. *Id.* at 89-91. The rationales offered by the Warden in this case fail under the first factor discussed in *Turner:* there is no " 'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it."15 [FN15] *Id.* at 89. Therefore, we reverse the district court's decision dismissing Gerber's § 1983 claim and remand that claim for further consideration.

B. State Law Claim

We now turn to Gerber's state law claim. Gerber asserts that CAL. PENAL CODE §§ 2600 and 2601 bar the CDC from preventing him from providing a semen specimen to artificially inseminate his wife.

CAL. PENAL CODE § 2600 provides that "[a] person sentenced to imprisonment in a state prison may during that period of confinement be deprived of such rights, and only such rights, as is reasonably related to legitimate penological interests." California prisoners retain the right to marry. Cal. Penal Code § 2601(e).

In *Thompson v. Dept. of Corrections*, 18 P.3d 1198 (Cal. 2001), the California Supreme Court stated that, because the language of the statute quotes the language the Supreme

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procedure, such as increased safety and security costs. However, the Warden has not, on the limited record before us, shown this to be the case or that these costs would be overly burdensome.

15. It is unnecessary at this time to consider the other *Turner* factors. Satisfying the first *Turner* factor is "necessary, though not necessarily sufficient, to sustain a prison policy abridging constitutional rights." *Casey v. Lewis*, 4 F.3d 1516, 1523-24 (9th Cir. 1993).

Court used in *Turner*, § 2600 is interpreted under the test set forth in *Turner*. *Id.* at 1206.

Therefore, the analysis for the state law claim is identical to the analysis of Gerber's § 1983 claim. Under California state law, the right to procreate is also a fundamental protected right. *See Johnson v. Calvert*, 851 P.2d 776, 787 (Cal. 1993). Thus, we conclude that the right to procreate does survive incarceration and that the arguments advanced as valid reasons to restrict Gerber's exercise of that right fail as a matter of law, at this stage of the proceedings. Therefore, we reverse the district court's order granting the Warden's motion to dismiss Gerber's state law claim and remand that claim also for further consideration.

IV. CONCLUSION

The district court erred by concluding that the right to procreate does not survive incarceration. Furthermore, consideration of the Warden's arguments requires the development of a record to permit the court to determine whether legitimate penological interests exist that would justify a total ban on Gerber's exercise of his procreative rights during his period of incarceration (presumably for the rest of his natural life).

Accordingly, we **REVERSE** the district court's decision dismissing Gerber's claims *893 and **REMAND** this matter for further proceedings consistent with this opinion.

SILVERMAN, Circuit Judge, dissenting:

This is a seminal case in more ways than one. Contrary to all precedent, the majority today holds that a prison inmate--in this instance, an inmate serving a life sentence--has a *constitutional* right to mail his semen from prison so that his wife can be artificially inseminated. With the utmost respect, the majority's reading of the Constitution is as unprecedented as it is ill- conceived.

The majority simply does not accept the fact that there are certain downsides to being confined in prison, and that the interference with a normal family life is one of them. *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972). It is true that inmates do not lose all constitutional rights upon incarceration. It is true that they retain the right to marry. *Turner v. Safley*, 482 U.S. 78 (1987). It is true that the Eighth Amendment protects them against forced surgical sterilization. *Skinner v. Oklahoma*, 316 U.S. 535 (1942). All of that, however, is a far cry from holding that inmates retain a constitutional right to procreate from prison via FedEx. The *Turner* Court recognized that even though the right to marry survives incarceration, the right to have the marriage "fully consummated" is but an "expectation" postponed until the inmate is released from custody. 482 U.S. at 96 That is why the Second Circuit held that the Constitution does not guarantee prison inmates a right to conjugal visits. *Hernandez v. Coughlin*, 18 F.3d 133, 136-37 (2d Cir. 1994):

> Although it is clear that prisoners have a fundamental right to marry, this constitutionally protected guarantee is substantially limited as a result of incarceration. Similarly, inmates possess the right to maintain their procreative abilities *for later use* once released from custody, even though this right is restricted. [citing *Skinner v. Oklahoma*] * * * Rights of marital privacy, like the right to marry and procreate, are necessarily and substantially abridged in a prison setting.

Citations omitted; emphasis added.

In no reported decision concerning a prisoner's claim of a right to procreate from prison by artificial insemination has any court ever upheld such a right. Quite to the contrary:

- *Anderson v. Vasquez*, 827 F. Supp. 617, 620 (N.D. Cal. 1992) ("no constitutional right to have an inmate's sperm preserved for artificial insemination exists") *aff'd in part, rev'd in part on other grounds*, 28 F.3d 104 (9th Cir. 1994) (unpublished mem. disposition).
- *Goodwin v. Turner*, 702 F. Supp. 1452, 1453-54 (W.D. Mo. 1988) ("The Court has approached this novel case fully cognizant of the legal parameters, but with a willingness to stretch those boundaries as necessary to satisfy any fundamental right that petitioner may have in regard to artificial insemination of his wife. There exists, however, an insurmountable obstacle--the fact of incarceration--that necessarily restricts any decision rendered herein. * * * Regardless of the marital rights that do survive incarceration, many aspects of marriage that make it a basic civil right, such as cohabitation, sexual intercourse, and the bearing and rearing of children, are superseded by the fact of confinement.").
- *Goodwin v. Turner*, 908 F.2d 1395 (8th Cir. 1990) ("Even assuming, without deciding, that the exercise of Goodwin's right to ***894** procreate is not fundamentally inconsistent with his status as a prisoner, the restriction imposed by the Bureau [of Prisons] is reasonably related to achieving its legitimate penological interest.").
- *See also State v. Oakley*, 629 N.W.2d 200, 209 (Wis. 2001) ("incarceration, by its very nature, deprives a convicted individual of the fundamental right to be free from physical restraint, which in turn encompasses and restricts other fundamental rights, such as the right to procreate.").

Common sense also suggests that procreation is fundamentally inconsistent with incarceration. A lawful prison sentence "constitutionally deprive[s] the criminal defendant of his liberty to the extent that the State may confine him and subject him to the rules of its prison system." *Meachum v. Fano*, 427 U.S. 215, 224 (1976). "[T]hese restrictions or retractions also serve, incidentally, as reminders that, under our system of justice, deterrence and

retribution are factors in addition to correction." *Hudson v. Palmer*, 468 U.S. 517, 524 (1984). Because the right to procreate is "fundamentally incompatible with imprisonment itself" (the standard applied in *Hudson*), the majority's analysis of whether there is a legitimate penological reason to abridge that right is all beside the point. There is no such right. Prisoners do not have a right to procreate while in prison.

Charles H. Whitebread, the renowned and witty professor of constitutional law at the University of Southern California, is fond of saying that some people believe that inmates retain only two rights when they go to prison--the right to serve their time and the right not to be exposed to second-hand smoke. That is not my view. I fully recognize that "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution." *Turner*, 482 U.S. at 84. However, I do believe that "[c]ertainly most, if not all, reasonable minds would agree that a prohibition against artificial insemination does not subject a federal prisoner to a 'fate forbidden by the principle of civilized treatment guaranteed by the Eighth Amendment,'" *Goodwin*, 702 F. Supp. at 1455, or in this case, by the Fourteenth Amendment. And because prison inmates have no right to procreate while in prison, I would hold, as the district judge did, that the plaintiff's state law claim necessarily fails.

For these reasons, I would affirm the district court's dismissal of the plaintiff's lawsuit, and therefore, respectfully dissent.

(103 F.Supp.2d 1214)

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

WILLIAM GERBER, Plaintiff,
v.
WARDEN RODNEY HICKMAN, Defendant.

No. Civ. S991315 FCD JFM P.

June 23, 2000.

AMENDED MEMORANDUM AND ORDER

DAMRELL, District Judge.

***1215** Plaintiff William Gerber, a state prisoner, brings this civil rights action pursuant to 42 U.S.C. § 1983 alleging that defendant Rodney Hickman, Acting Warden of Mule Creek State Prison, violated his constitutional right to procreate by refusing to allow him to artificially inseminate his wife. Plaintiff also contends that defendant's refusal violated his rights under Cal. Penal Code §§ 2600 and 2601. Defendant moves to dismiss, or in the alternative for summary judgment of, plaintiff's claims.

This matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local General Order No. 262. On March 7, 2000, the magistrate judge filed findings and recommendations which were served on all parties and which contained notice to all parties that any objections to the findings and recommendations were to be filed within ten days. Defendant has filed objections, and plaintiff has filed a response thereto.

***1216** In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 72-304, this court has conducted a *de novo* review of this case. Having carefully

reviewed the entire file, the court rejects the findings and recommendations of the magistrate judge, and grants defendant's motion to dismiss.

STANDARD

A complaint will not be dismissed under Fed. R. Civ. P. 12(b)(6) "unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim that would entitle him to relief." *Yamaguchi v. U.S. Department of Air Force*, 109 F.3d 1475, 1480 (9th Cir.1997) (quoting *Lewis v. Telephone Employees Credit Union*, 87 F.3d 1537, 1545 (9th Cir.1996)). "All allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party." *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir.1996).

BACKGROUND

Plaintiff, a forty-one year old man, is an inmate at Mule Creek State Prison serving a sentence of 100 years to life plus eleven years. Plaintiff's wife, Evelyn Gerber, is forty-four years old. Plaintiff and his wife want to have a baby. The California Department of Corrections ("CDC") prohibits family visits for inmates "sentenced to life without the possibility of parole [or] sentenced to life, without a parole date established by the Board of Prison Terms." Cal. Code Regs. tit. 15 § 3174(e)(2). No parole date has been set for plaintiff, and according to plaintiff, due to the length of his sentence, no parole date seems likely. Accordingly, he wishes to artificially inseminate his wife. To accomplish this, plaintiff requests that (1) a laboratory be permitted to mail him a plastic collection container at the prison along with a prepaid return mailer, (2) he be permitted to ejaculate into the container, and (3) the filled container be returned to the laboratory in the prepaid mailer by overnight mail. Alternatively, plaintiff requests that his counsel be permitted to personally pick up the container for transfer to the

laboratory or health care provider. Plaintiff represents that he and his wife will bear all of the costs associated therewith, including any costs incurred by the CDC. Defendant refuses to accommodate plaintiff's request.

ANALYSIS

Plaintiff contends that defendant violated his constitutional and statutory right to procreate by refusing to allow him to artificially inseminate his wife. The right to procreate is a fundamental right. *Planned Parenthood v. Casey*, 505 U.S. 833, 851, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992). Not all rights, however, survive incarceration, and even those that do are subject to significant restrictions. *See, e.g., Turner v. Safley*, 482 U.S. 78, 95-96 (1987). Defendant moves to dismiss plaintiff's complaint on the ground that there is no constitutional or statutory right to artificial insemination while incarcerated.

A "prison inmate 'retains those [constitutional] rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system.'" *Id.* at 95 (quoting *Pell v. Procunier*, 417 U.S. 817, 822 (1974)). In *Turner*, the Supreme Court held that the right to marry survives incarceration. Although prisoners have a fundamental right to marry, this constitutionally protected guarantee is substantially limited as a result of incarceration. *See id.* at 95. Significantly, the Constitution does not create any protected guarantee to conjugal visitation privileges while incarcerated. *See, e.g., Hernandez v. Coughlin*, 18 F.3d 133, 137 (2d Cir. 1994). Nor does it create, for the reasons set forth below, a right to a means of procreation--in this case, artificial insemination.

In *Anderson v. Vasquez*, plaintiff asserted a right to artificial insemination while in prison. The district court rejected plaintiff's assertion, holding that there is "no *1217 constitutional right to have an inmate's sperm preserved for artificial insemination [ ]." 827 F. Supp. 617, 620 (N.D. Cal.1992) (citing *Goodwin v. Turner*, 702 F. Supp. 1452, 1455

(D. Mo.1988)). The plaintiff argued that such a right derived from the fundamental right to procreate. The district court rejected plaintiff's assertion "because the existence of any such right does not survive incarceration." *Id.* The court reasoned that "many aspects of marriage that make it a basic civil right, such as cohabitation, sexual intercourse, and the bearing and rearing of children, are superseded by the fact of confinement. Artificial insemination as a method of begetting a child, falls within this realm of unavailable 'incidents of marriage.'" *Id.* at 621 (quoting *Goodwin*, 702 F.Supp. at 1454). Accordingly, the court held that the right to artificial insemination is "fundamentally inconsistent with imprisonment itself." *Id.* (quoting *Goodwin*, 702 F. Supp. at 1454) (quoting *Hudson v. Palmer*, 468 U.S. 517, 522-23 (1984)).[1]

Similarly, in *Goodwin*, the district court found that "regardless of the right petitioner has asserted, whether a right to privacy, a right to be free of cruel and unusual punishment, or a due process right, he does not have a fundamental constitutional right to father a child through artificial insemination." 702 F. Supp. at 1453. The court's decision "is governed by [its] impression that the existence of a 'right' such as here asserted is 'fundamentally inconsistent with imprisonment itself.' " *Id.* at 1454 (quoting *Hudson*, 468 U.S. at 523). The court distinguished the right to procreate outlined in *Skinner v. Oklahoma*, 316 U.S. 535 (1942), which involved forced sterilization of prisoners, on the ground that "*Skinner* involved a permanent deprivation of the means to procreate, rather than a mere delay as in petitioner's case." *Id.* The court also rejected the plaintiff's assertion that the claimed right was a necessary corollary of

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1. On review, the Ninth Circuit found that this issue was not ripe because plaintiff's complaint failed to allege that a specific request for artificial insemination had been made. Accordingly, the Ninth Circuit reversed that portion of the district court's decision dismissing plaintiff's claim with prejudice, and instructed the court to dismiss it without prejudice. *See Anderson v. Vasquez*, 1994 WL 362699 at *3-4 (9th Cir. July 13, 1994). This court does not cite to the district court's decision as authority, but rather because it finds the court's reasoning compelling.

the right to marry, reasoning that the Supreme Court impliedly rejected such an assertion in *Turner* when it noted that "[m]ost inmate marriages are formed in the expectation that they ultimately will be fully consummated." *Id.* The court noted that although certain marital rights survive incarceration, many basic rights associated with marriage do not, including the right to cohabitation, sexual intercourse, and artificial insemination as a method of begetting a child. *Id.* Finally, the court rejected plaintiff's assertion that his right was protected under his right to privacy. The court explained that:

> [A]ny privacy interest petitioner might allege in becoming a parent through artificial insemination is necessarily infringed upon by the nature of incarceration, and must be circumscribed. . . . Whatever privacy interest an inmate might have, nowhere does it appear that such interest imposes an affirmative duty on the government, whether it be to provide facilities for conjugal visits or the means to assist in artificial insemination.

Id. at 1455.[2]

The court finds the reasoning of the district courts in *Goodwin* and *Anderson* *1218 compelling. Whatever right plaintiff has to artificial insemination, it does not survive incarceration. As the Second Circuit observed in *Hernandez*, "inmates possess the right to maintain their procreative abilities for later use once released from custody, even though this right is restricted." 18 F.3d at 137 (citing *Skinner*, 316 U.S. at 541).

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2. On appeal, the Eighth Circuit held that it need not reach this issue, because "[e]ven assuming, without deciding, that the exercise of [the] right to procreate is not fundamentally inconsistent with [the petitioner's] status as a prisoner, the restriction imposed [on that right] is reasonably related to achieving its legitimate penological interest." *Goodwin v. Turner*, 908 F.2d 1395, 1398 (8th Cir.1990).

Plaintiff argues that due to the length of his sentence and his wife's age, he will be unable to utilize his procreative abilities once released. Thus, according to plaintiff, defendant's refusal to accommodate his request is tantamount to forced sterilization. As the *Goodwin* court recognized, "[t]he [Bureau of Prisons] neither is nor should be responsible for guaranteeing a procreative opportunity." *Id.* (citing generally *Poe v. Gerstein*, 517 F.2d 787, 796 (5th Cir.1975)). The court agrees with *Goodwin*, that "[t]here is simply no comparison between sterilization, . . . and the denial of the facilitation of artificial insemination." *Id.*

In addition to the above, plaintiff argues that defendant's refusal to accommodate his request violates his equal protection rights. First, plaintiff contends that the CDC routinely treats male and female defendants differently with respect to their procreative rights. Plaintiff argues that because the CDC does not require female inmates to have an abortion if they are or become pregnant during incarceration, female inmates, unlike male inmates, have both the right to procreate and the right to make decisions about the same. Plaintiff's argument fails for two reasons. First, with respect to the decision as to whether to terminate a pregnancy, male and female inmates are not similarly situated because male inmates cannot become pregnant. To the extent male and female inmates are similarly-situated (sentenced to life without the possibility of parole or sentenced to life without a parole date), neither are permitted conjugal visits nor a means to procreate in prison. Thus, they are treated the same.[3]

Second, plaintiff argues that defendant's refusal to accommodate his request violates his equal protection rights because it treats two classes of male offenders differently--those convicted before and those convicted after

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3. A more troubling and colorable equal protection argument would arise if the court were to recognize a constitutional right to procreate while incarcerated. Female inmates would then arguably have a corollary right to be inseminated. The court hastens to speculate as to the institutional and societal chaos which would result.

the "three strikes" law. According to plaintiff, an individual with an identical record but whose offense predated the "three strikes" law would have received only a five year enhancement, and thus, would have been afforded conjugal visits and/or would have been released in time to procreate outside of prison. Plaintiff is not similarly situated to those defendants whose crimes predate the "three-strikes" law. *See People v. Spears*, 40 Cal.App.4th 1683, 1688 (1995) (holding that provision of "three strikes" statute limiting sentence credits available to defendant with prior violent or serious felony convictions did not violate equal protection despite fact that defendant with identical record whose offenses preceded enactment of "three strikes" legislation would receive less severe punishment).

> It is perfectly proper for the Legislature to create a new sentencing procedure which operates prospectively only. Despite the disparity created by rendering different sentences after an admittedly arbitrarily chosen date, prospective application of such a statute does not violate equal protection principles, because of the legitimate public purpose of assuring that penal laws will maintain their desired deterrent effect by carrying out the original prescribed punishment as written.

Id. (internal quotations and citation omitted) (quoting *People v. Gilchrist*, 133 Cal.App.3d 38, 45 (1982)).

> ***1219** Fixing the day the offense was committed as the watershed results in an entirely reasonable classification and does not deny equal protection to those whose offenses predate [the legislative change].

Spears, 40 Cal.App.4th at 1688 (quoting *People v. Superior Court*, 78 Cal.App.3d 134, 143 (1978)).

For the reasons set forth above, the court holds that during incarceration a prisoner loses his or her right to access to a means of procreation, be it conjugal visits, artificial insemination, *in vitro* fertilization, etc.[4] Accordingly, plaintiff's claims brought pursuant to 42 U.S.C. § 1983 are dismissed.

Plaintiff also claims that defendant's failure to accommodate his request to artificially inseminate violated his rights guaranteed by Cal. Penal Code §§ 2600 and 2601. Section 2600 provides that "persons sentenced to imprisonment in state prison may during that period of confinement be deprived of such rights ... as is reasonably related to legitimate penological interests." "Reviewing a claim under section 2600 requires a three-step inquiry: (1) Are any 'rights' implicated? (2) If they are, does a 'reasonable security' problem exist which might permit a deprivation of rights under the statute? (3) If so, to what extent are deprivations of those rights 'necessary' to satisfy reasonable security interests." *In re Roark*, 48 Cal.App.4th 1946, 1951, (1996) (quoting *In re Arias*, 42 Cal.3d 667, 689-690 (1986)). Here, plaintiff fails the first test. As set forth above, plaintiff's asserted constitutional right does not survive incarceration. Section 2601 enumerates certain civil rights possessed by persons described in § 2600. The only arguably applicable right is the right to marry. As discussed above, plaintiff's right to marry is subject to numerous restrictions while plaintiff is incarcerated and does not include a right to a means of procreation. Accordingly, plaintiff's claims brought pursuant to Cal. Penal Code §§ 2600 and 2601 are dismissed.

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4. Because the court finds that there is no right to artificial insemination in prison, the court need not determine whether defendant's refusal to accommodate plaintiff's request is reasonably related to legitimate penological interests.

CONCLUSION

Defendant's motion to dismiss is GRANTED. The clerk is hereby directed to close the file.

IT IS SO ORDERED.

DATED: June 22, 2000

/s/ FRANK C. DAMRELL, JR.
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

WILLIAM GERBER, Plaintiff,

vs.

WARDEN RODNEY HICKMAN, Defendant.

No. CIV S-99-1315 FCD JFM P

FINDINGS & RECOMMENDATIONS

Plaintiff is a state prisoner proceeding through counsel with a civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff contends that defendant is violating his constitutional rights by refusing to allow plaintiff to provide sperm for the artificial insemination of his wife. This matter is before the court on defendant's motion to dismiss and/or for summary judgment.[1] In support of dismissal, defendant contends that there is no constitutional right to procreate while incarcerated. In support of summary judgment, defendant contends that the California Department of Corrections' refusal to allow plaintiff to provide sperm for artificial insemination is a reasonable restriction on any constitutional right to procreate that plaintiff may retain.

I. Defendant's Motion to Dismiss

In considering a motion to dismiss, the court must accept as true the allegations of the complaint in question, Hospital Bldg. Co. v. Rex Hospital Trustees, 425 U.S. 738, 740 (1976), construe the pleading in the light most favorable

1. This court heard oral argument on the motion on March 2, 2000. Kenneth L. Rosenfeld and Teresa Zuber appeared as counsel for plaintiff. Gregory Walston, Deputy Attorney General, appeared as counsel for defendant.

to the party opposing the motion and resolve all doubts in the pleader's favor. Jenkins v. McKeithen, 395 U.S. 411, 421, reh'g denied, 396 U.S. 869 (1969). Moreover, pro se pleadings are held to a less stringent standard than those drafted by lawyers. Raines v. Kerner, 404 U.S. 519, 520 (1972). A motion to dismiss for failure to state a claim should not be granted unless it appears beyond doubt that plaintiff can prove no set of facts in support of the claim that would entitle him to relief. See Hishon v. King & Spalding, 467 U.S. 69,73 (1984), citing Conley v. Gibson, 355 U.S. 41, 45-46 (1957); see also Palmer v. Roosevelt Lake Log Owners Ass'n, 651 F.2d 1289, 1294 (9th Cir. 1981).

As noted above, in his complaint, plaintiff alleges that defendant has violated his constitutional rights by refusing to allow plaintiff to provide sperm for the artificial insemination of his wife. Defendant contends that prison inmates possess no constitutionally protected right to procreate while incarcerated and, therefore, that plaintiff has failed to state a cognizable claim for violation of his constitutional rights.

It is well-established that the right to make personal decisions regarding procreation is a liberty interest protected by the United States Constitution. The federal constitution protects "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education." Planned Parenthood of Southern Pennsylvania v. Casey, 505 U.S. 833, 851 (1992) (Casey) (citing Carey v. Population Services International, 431 U.S. 678, 685 (1977)). Decisions of the United States Supreme Court "recognize 'the right of the individual, married, or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child," Casey, at 851 (quoting Eisenstadt v. Baird, 405 U.S. 438, 453 (1972)), and its "precedents 'have respected the private realm of family life which the state cannot enter."' Casey, at 851 (quoting Prince v. Massachusetts, 321 U.S. 158, 166 (1944)). "These matters, involving the most intimate and personal choices a person

may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment." Casey, at 851. See also Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (right to procreate is "one of the basic civil rights of man.")

"Prison walls do not form a barrier separating prison inmates from the protections of the Constitution." Turner v. Safley, 482 U.S. 78, 84 (1987). "[A] prison inmate 'retains those [constitutional] rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system."' Turner, at 95 (quoting Pell v. Procunier, 417 U.S. 821, 822 (1974). The decision to become a father is not inconsistent with an individual's status as a prisoner or the legitimate penological objectives of the corrections system.

Two federal district courts have held that the right to procreate is "'fundamentally inconsistent with imprisonment itself."' Goodwin v. Turner, 702 F.Supp. 1452, 1454 (W.D. Mo. 1988) (quoting Hudson v. Palmer, 468 U.S. 517, 523 (1983), affirmed on other grounds, 908 F.2d 1395 (8th Cir. 1990). See also, Anderson v. Vasquez, 827 F.Supp. 617, 621 (N.D. Cal. 1992), affirmed in part, reversed in part, Anderson v. Vasquez, 28 F.3d 104 (9th Cir. 1994). In neither case was that holding affirmed by the court of appeals.

In Goodwin, the United States Court of Appeals for the Eighth Circuit assumed without deciding that the right to procreate survived incarceration, but held that a regulation adopted by the federal Bureau of Prison[s] (BOP) prohibiting male inmates from providing sperm for artificial insemination of their wives was reasonably related to a legitimate penological interest. Goodwin, 908 F.2d at 1398. In Anderson, the United States Court of Appeals for the Ninth Circuit, in an unpublished opinion, held that the constitutional claim of death row inmates' [*sic*] arising out of San Quentin Prison's failure to provide a means for preserving semen for artificial insemination was not ripe for review.

There is no binding authority which supports the proposition for which defendant argues, and there are several persuasive arguments to the contrary. See Goodwin, 908 F.2d at 1400-1403 (McMillian, J., dissenting). On the record presently before this court, defendant has failed to establish as a matter of law that the right to procreate does not exist during incarceration.

Moreover, as a general rule, the question of whether a constitutional right survives incarceration requires inquiry into both the practical aspects of restrictions that arise as a consequence of an individual's status as a prisoner, and "'the legitimate penological objectives of the corrections system.'" Turner, at 95 (quoting Pell v. Procunier, supra, 417 U.S. 817, 822 (1974). See also, Goodwin v. Turner, 702 F.Supp. at 1454, quoting Wolff v. McDonnell, 418 U.S. 539, 555 (1974) ("Curtailment of some interests is necessary, as a practical matter, to accommodate the myriad of 'institutional needs and objectives' of prison facilities."). In this court's view that inquiry is, in essence, identical to the Turner analysis required when a prison regulation impacts a fundamental constitutional right and is best undertaken on a fully developed factual record and not on a motion to dismiss.

For the foregoing reasons, the court will recommend that defendant's motion to dismiss be denied.

II. Defendant's Motion for Summary Judgment

Defendant has moved in the alternative for summary judgment, contending that the restriction on artificial insemination is reasonably related to the legitimate penological goals of treating male and female inmates equally "to the extent possible" and "conserving prison resources." Plaintiff has made a substantial showing that numerous facts are in dispute, and an adequate showing under Rule 56(f) that he requires additional discovery to oppose several of defendant's contentions. The court will recommend that defendant's motion for summary judgment

be denied without prejudice to its renewal at a later stage of this litigation.[2]

For all of the foregoing reasons, IT IS HEREBY RECOMMENDED that:

1. Defendant's January 5, 2000 motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) be denied;

2. Defendant be directed to answer the amended complaint within twenty days from the date of any order by the district court adopting these findings and recommendations

3. Defendant's January 5, 2000 motion for summary judgment be denied without prejudice; and

4. Plaintiffs February 10, 2000 request for summary judgment be denied without prejudice.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within ten days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections shall be served and filed within ten days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

DATED: March 7, 2000

/s/ JOHN F. MOULDS
UNITED STATES MAGISTRATE JUDGE

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2 Plaintiff asks, in the alternative, that the court enter judgment in his favor sua sponte. In this court's view, plaintiff's request is premature and the court will recommend that it be denied without prejudice.

MOTION FILED
OCT 17 2002

NO. 02-419

(2)

IN THE
SUPREME COURT OF THE UNITED STATES

WILLIAM GERBER,

PETITIONER,

V.

RODERICK HICKMAN,

RESPONDENT.

On Petition of Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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MOTION OF THE PECHANGA BAND OF LUISENO MISSION INDIANS FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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MOTION OF THE PECHANGA BAND OF LUISENO MISSION INDIANS FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE*

Relief Sought

Pursuant to Rule 37.2(b) of the Rules of this Court, *Amicus curiae,* the Pechanga Band of Luiseno Mission Indians, move for leave to file the attached Brief of *Amicus Curiae* in Support of the Petitioner.

Name Of Party Withholding Consent To Filing *Amicus* Brief

Petitioner William Gerber has consented to the filing of the brief. This motion is necessary because Respondent Roderick Hickman (hereinafter referred to as "the warden") has denied consent.

Nature Of Movant's Interest

The Ninth Circuit's determination that an inmate's right to procreate with his wife is fundamentally inconsistent with incarceration conflicts with the Court's precedent governing inmate rights. It is also contrary to the rights afforded inmates under California's Constitution.

The proposed means of procreation, artificial insemination via delivery of the inmate's semen sample outside the prison walls, also impacts the rights of a non-prisoner spouse because it involves outgoing mail. A heightened scrutiny review under the Court's holding in *Procunier v. Martinez*, 416 U.S. 396 (1974), *Turner v. Safley*, 482 U.S. 78 (1987) and *Thornburgh v. Abbott*, 490 U.S. 401 (1989) makes it clear that the warden's decision cannot be sustained. At the very least, a factual inquiry had

to be conducted under *Turner v. Safley*, 482 U.S. 78 (1987) to determine if the warden's decision was reasonably related to legitimate penological interests.

Petitioner's wife is a member of a federally-recognized Indian Tribe, *amicus* herein. By upholding the warden's decision to de facto sterilize petitioner for life, the Ninth Circuit has condoned a decision by the state to interfere with the propagation of certain groups and races – a danger the Court recognized and struck down in *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

The Tribe respectfully requests the Court's permission to submit the accompanying *amicus* brief to address this important Constitutional issue.

Dated: October 17, 2002 Respectfully submitted,

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QUESTION PRESENTED

The Ninth Circuit upheld respondent's motion to dismiss petitioner's claim to be allowed to procreate with his wife by means of artificial insemination, without any attempted showing that the bar is related to penological interests. In effect, the court of appeals has determined that an inmate has no Constitutional protections, even if a prison regulation is not "reasonably related to legitimate penological interests." *Turner v. Safley*, 482 U.S. 78, 84 (1987). This case is particularly troublesome because the Ninth Circuit's decision derails the Constitutional right to have children of thousands of married male inmates confined in California's state penal system. At the same time, it strikes down, without any rationale reason, the rights of thousands of wives to have children with their husbands.

Support of one's family is conducive to stability in an inmate population and directly benefits penological interests: "The value of visiting as a means to establish and maintain meaningful family and community relationships is recognized and encouraged." Cal. Code Regs. title 15, § 3170(a) (2002). A prisoner who maintains family ties is one who is less likely to be problematic for the correctional facility. Yet, in this instance, the prison warden, for no reason related to a legitimate penological interest, has denied a husband and wife the right ever to have children together, by any means of conception.

The question presented is: Does a married inmate's right to have children with his wife survive incarceration when there is no showing of any contrary penological interest?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONER 1

INTEREST OF THE *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. The Ninth Circuit's Determination That Mr. Gerber's Right To Procreate Does Not Survive Incarceration Conflicts With The Standards Established By This Court And With The Holdings Of Other United States Courts Of Appeals. 3

A. Respondent's Denial Of Petitioner's Constitutional Right To Procreate Is An Impermissible Exercise Of Racial And Genetic Control By The State Of California. 3

B. Heightened Scrutiny Is Required When Dealing With Inmates' Outgoing Mail Because It Affects The Constitutional Rights Of Third Parties. 5

C. An Inmate's Spouse's Constitutional Right To Procreate Should Be One Of The Factors Considered In A *Turner* Analysis. 11

D. An Inmate's Right To Procreate By Means Of Artificial Insemination Is Not Inconsistent With His Status As A Prisoner. 13

II. Fundamental Notions Of Due Process Confirm That, In California, Incarceration Does Not Terminate The Constitutional Right To Procreate. 17

CONCLUSION 20

TABLE OF AUTHORITIES

CASES

In re Arias,
42 Cal. 3d 667, 725 P.2d 664,
230 Cal. Rptr. 505 (1986) 18, 19

Calif. Highway Committee
v. Industrial Acc. Comm.,
200 Cal. 44, 251 P. 808 (1926) 17-18

Conservatorship of Valerie N.,
40 Cal. 3d 143, 707 P.2d 760,
219 Cal. Rptr. 387 (1985) 18, 19

DeLancie v. Superior Court,
31 Cal. 3d 865, 647 P.2d 142,
183 Cal. Rptr. 866 (1982),
overturned on other grounds,
People v. Loyd,
27 Cal. 4th 997, 45 P.3d 296,
119 Cal. Rptr. 2d 360 (2002) 18, 19

Frisby v. Schultz,
487 U.S. 474 (1988) 17

Gerber v. Hickman,
291 F.3d 617 (9th Cir. 2002) ..... *passim*

Goodwin v. Turner,
908 F.2d 1395 (8th Cir. 1990) 11, 12

Griswold v. Connecticut,
381 U.S. 479 (1965) 17

Lambert v. Wiklund,
520 U.S. 292 (1997) 13-14

Monmouth County Correctional Institution Inmates v. Lanzarro,
834 F.2d 326 (3d Cir. 1987) 11

Pell v. Procunier, 417 U.S. 817 (1974) 14

Procunier v. Martinez,
416 U.S. 396 (1974) ..... *passim*

Skinner v. Oklahoma,
316 U.S. 535 (1942) 4, 5, 20

Thompson v. Department of Corrections,
25 Cal. 4th 117, 18 P. 3d 1198,
105 Cal. Rptr. 2d 46 (2001) 19

Thornburgh v. Abbott,
490 U.S. 401 (1989) ..... *passim*

Turner v. Safley,
482 U.S. 78 (1987) ..... *passim*

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FEDERAL

65 Fed. Reg. 13298 (March 12, 2000) 1
Fed. R. Civ. P. 12 16
Sup. Ct. R. 10 2
Sup. Ct. R. 10(a) 11
Sup. Ct. R. 10(c) 14, 17
25 U.S.C. §§ 1901-1914 1-2
25 U.S.C. § 1652 17

STATE

Ariz. Rev. Stat. 13-4240 9
Ark. Code Ann. 16-112-124 9
Cal. Penal Code § 295 *et seq.* 10
Cal. Penal Code § 1405 ..... 9, 10
Cal. Penal Code § 1405(g) 9-10
Cal. Penal Code § 2600 18-19
Cal. Code Regs. title 15, § 3170(a) ..... i, 4-5
D.C. Code Ann. 4031-4035 9
Del. Code Ann. tit. 11, 4504 9
Fla. Stat. ch. 925.11(1)(a) 9
Idaho Code 19-2719 9
Idaho Code 19-4902 9
725 Ill. Comp. Stat. 5/116-3 9
Ind. Code 35-38-7-1 9
La. Code Crim. Proc. Ann. art. 926.1 9
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Mich. Comp. Laws 770.16 9
Minn. Stat. 590.01 9
Mo. Rev. Stat. 547.035 9
N.C. Gen. Stat. 15A-269 9
N.J. Stat. Ann. 2A:84A-32a 9
N.M. Stat. Ann. 31-1A-1 9
N.Y. Crim. Proc. Law 440.30 9
Neb. Rev. Stat. 29-4117 9
Okla. Stat. tit. 22, 1371, 1371.1 9
Okla. Stat. tit. 22, 1372 9
Or. 2001 Leg., 71st Sess. 9
Tenn. Code Ann. 40-30-401 9
Tex. Code Ann. Crim. Proc. art. 64.03 9
Utah Code Ann. 78-35a-301 9
Va. Code Ann. 19.2-327.1 9
Wash. Rev. Code 10.73.170 9

Wisc. Stat. 974.07 9

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OTHER MATERIALS

15 Cal. Att. Gen. Ops. 38 (1950)..... 17-18

BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*

Amicus curiae, the Pechanga Band of Luiseno Mission Indians (the "Tribe"), is a federally-recognized Indian tribe, *see* 65 Fed. Reg. 13298 at 13300 (March 12, 2000).[1] Evelyn Gerber, the spouse of petitioner William Gerber, is a member of the Tribe. Under the laws of the Tribe, Mr. and Mrs. Gerber's child would be eligible for tribal membership. The Tribe has a substantial interest in protecting the right of its member, Mrs. Gerber, to procreate and bring a child into this world.

Mrs. Gerber is a member of the Tribe's Cultural Committee, and she is the tribally-designated caretaker of the Ringing Rock Sacred Site located near the Tribe's reservation in Temecula, California. Mr. and Mrs. Gerber intend on raising their future children in the traditional Luiseno culture and language.

The Tribe has a federally-recognized interest in protecting the interests of its members, including children that are eligible for tribal membership. The Indian Child Welfare Act, 25 U.S.C. §§ 1901 - 1914, recognizes that "there is no resource more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as a trustee, in protecting

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[1] Counsel for the *amicus curiae* authored this brief in its entirety. No person or entity other than the *amicus curiae* or their counsel made a monetary contribution to the preparation or submission of this brief. The letter from the petitioner consenting to the filing of this brief has been lodged with the Clerk of the Court. Respondent has denied consent.

Indian children who are members of or are eligible for membership in an Indian tribe." 25 U.S.C. § 1901(3). The Tribe, therefore, has an interest in challenging the warden's arbitrary denial of Mr. and Mrs. Gerber's request for artificial insemination.

SUMMARY OF ARGUMENT

The Ninth Circuit's decision in *Gerber v. Hickman*, 291 F.3d 617 (9th Cir. 2002) directly conflicts with applicable decisions of this Court with respect to an important issue – the fundamental right of a married inmate to have a child with his wife. The deprivation of this right is all the more troubling because the Ninth Circuit upheld the granting of the warden's motion to dismiss by ignoring the Court's standards governing prisoner rights set forth in *Turner v. Safley*, 482 U.S. 78 (1987) and *Procunier v. Martinez*, 416 U.S. 396 (1974).

This matter is of importance under Rule 10 of the Court because it implicates the Constitutional rights of more than 1,400 married male prisoners sentenced under California's 3-strikes law who are incarcerated in the state of California penal system, it has an impact beyond the prison walls as it affects the Constitutional rights of spouses of married prisoners, and it conflicts with, and impacts the development of, the law with regard to prisoner rights under the Court's applicable precedent.

Where the issue is whether an inmate can mail a DNA sample (blood, semen or otherwise) outside the prison walls, a heightened scrutiny review of a prison administrator's decision to interfere with that process is called for. At the very least, a fact inquiry into whether the inmate's request has an impact on penological interests must be conducted before the inmate is deprived of the

Constitutional Right to ever have children, because of the nature of the sentence which the inmate is serving.

The state should not be permitted to deprive any individual of the fundamental right to have children where there is no showing that an inmate's right to procreate via artificial insemination has any impact on penological interests.

ARGUMENT

I. The Ninth Circuit's Determination That Mr. Gerber's Right To Procreate Does Not Survive Incarceration Conflicts With The Standards Established By This Court And With The Holdings Of Other United States Courts Of Appeals

A. Respondent's Denial Of Petitioner's Constitutional Right To Procreate Is An Impermissible Exercise Of Racial And Genetic Control By The State Of California

Certiorari is appropriate pursuant to Supreme Court Rule 10(c) because the Ninth Circuit's decision in *Gerber v. Hickman*, 291 F.3d 617 (9th Cir. 2002) directly conflicts with applicable decisions of this Court with respect to an important issue – the fundamental right of a married inmate to one day have a child with his wife.[2]

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[2] *See also* R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice*, § 4.5 at 232-233 (8th ed. 2002) (hereinafter "Stern & Gressman") ("A direct conflict between the decision of the court of appeals of which review is being sought and a decision of the Supreme Court is one of the strongest possible grounds for securing the issuance of a writ of certiorari.")

In striking down a state statute mandating forced sterilization for certain habitual criminals, the Court in *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) determined that the right to procreate is "one of the basic civil rights of man" and that "marriage and procreation are fundamental to the very existence and survival of the race." The Court warned that in "evil or reckless hands" a state's decision to prevent its inmates from having children can have a devastating impact, causing "races or types which are inimical to the dominant group to wither and disappear." *Id.* The "reckless hands" the Court foreshadowed in *Skinner* is reality in 21st Century California. The warden's decision to deny petitioner's request to artificially inseminate his wife has a direct impact on the propagation of the Tribe – a Native American race that lived in California long before the "state" came into existence – because it forecloses any possibility that Mrs. Gerber, who is in her mid-forties, can have children with her husband, who is serving a one hundred years to life plus eleven years prison sentence. As Judge Kozinski stated in his dissenting opinion in *Gerber v. Hickman*, 291 F.3d 617 (9th Cir. 2002):

> By cutting off Gerber's fundamental right to procreate, prison authorities have enhanced Gerber's punishment beyond that authorized by statute, and consigned Mrs. Gerber to a childless marriage. *Id.* at 632.

At a time when modern medicine, by means of artificial insemination, allows Mrs. Gerber to bear children without any impact on prison security, a prison warden has decided to exercise racial and genetic control and has relegated Mrs. Gerber to a life sentence – one without the possibility of having children with her husband. The warden's decision is also incomprehensible because stable family ties, and visitation by inmates' family members, are

recognized to be in the penal interest: "The value of visiting as a means to establish and maintain meaningful family and community relationships is recognized and encouraged." Cal. Code Regs. title 15, § 3170(a) (2002).

The warden's decision has "forever deprived [Mrs. Gerber] of a basic liberty" – the right to have children with her husband. *Skinner*, 316 U.S. at 541. The deprivation of this right is all the more troubling because the Ninth Circuit completely ignored the Court's standards governing prisoner rights in *Turner v. Safley*, 482 U.S. 78 (1987) and upheld a prison administrator's capricious decision that has no bearing on any penological interest.

B. Heightened Scrutiny Is Required When Dealing With Inmates' Outgoing Mail Because It Affects The Constitutional Rights Of Third Parties.

This matter is of importance under Rule 10 because the decision to deny inmates' fundamental right to procreate implicates the Constitutional rights of more than 1,400 married male prisoners sentenced under California's 3-strikes law who are incarcerated in the state of California penal systems,[3] has an impact beyond the prison walls and on the

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[3] There are 7,291 male 3-strikes inmates serving 25 year to life sentences in California. *See Second and Third Strikers in the Institution Population*, June 30, 2002, California Department of Corrections, p. 2 (July 2002), available online at www.cdc.state.ca.us/pdf/strike0602.pdf. And, according to 1997 data from the Bureau of Justice Statistics, twenty-three percent (23%) of inmates in state prisons are married. *See* C.J. Mumola, *Incarcerated Parents and Their Children*, Special Report of the Bureau of Justice Statistics, U.S. Dept. of Justice, Table 3 at 3 (August 2000), available online at www.ojp.usdoj.gov/bjs/ (hereinafter referred to as "Incarcerated Parents").

The total male inmate population in California's state prison system is 150,321 as of August, 2002. *See* California Department of Corrections Monthly Report of Population as of Midnight August 31, 2002. Report

Constitutional rights of spouses of married prisoners, and conflicts with, and impacts the development of, the law with regard to prisoner rights under the Court's earlier decisions in *Procunier v. Martinez*, 416 U.S. 396 (1974), *Turner v. Safley*, 482 U.S. 78 (1987) and *Thornburgh v. Abbott*, 490 U.S. 401 (1989).[4] Where the issue is whether an inmate can mail a DNA sample (blood, semen or otherwise) outside the prison walls, a heightened scrutiny review of a prison administrator's decision to interfere with that process is called for.

As this Court indicated, prison regulations may not unnecessarily infringe upon the Constitutional rights of non-prisoners. *Procunier v. Martinez*, 416 U.S. 396 (1974), *partially overruled on other grounds by, Thornburgh v. Abbott*, 490 U.S. 401 (1989). In *Martinez*, the Court explained that its review of prison restrictions on inmate correspondence involved more than merely examining an inmate's right to free speech, but rather those of free citizens as well:

> [C]ensorship of prisoner mail works a consequential restriction on the First and Fourteenth Amendment rights of those who are not prisoners. *Id.* at 409.

The Court's decision in *Martinez* "turned on the fact that the challenged regulation caused a consequential restriction on [Constitutional] rights of those who are not prisoners." *Turner v. Safley*, 482 U.S. 78, 86 (1987). Because the Court did not view the *Martinez* case strictly as a prisoner's rights case, the Court employed the heightened

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available online at www.cdc.state.ca.us/reports/Archive_PDF/Monthly/TotalPop/Aug2002.pdf.

[4] *See also* Stern & Gressman, § 4.11 at 243-244.

scrutiny test used in other instances to address "the general problem of incidental restrictions on First Amendment liberties." *Procunier v. Martinez*, 416 U.S. at 409.

In *Turner v. Safley*, 482 U.S. 78 (1987), the Court acknowledged that while *Martinez* addressed the rights of non-prisoners, the questions before it involved prisoner's rights – restrictions on inmate marriages and inmate-to-inmate correspondence. *Id.* at 85. Specifically, *Turner* acknowledged that *Martinez* could be applied to assess whether a prison regulation violates the fundamental right to marry of individuals who are not prisoners:

> [W]e note initially that the regulation prohibits marriages between inmates and civilians, as well as marriages between inmates. Although not urged by respondents, *this implication of the interests of nonprisoners may support the application of the Martinez standard, because the regulation may entail a consequential restriction on the constitutional rights of those who are not prisoners.* *Id.* at 97 (emphasis added).

With regard to a prisoner's right, the Court in *Turner* formulated a new standard of review that involved an inquiry into whether a prison regulation is reasonably related to legitimate penological interests. *Id.* at 89. It established a four-part test to determine the reasonableness of such regulations: (1) Whether there is a valid, logical connection between the regulation and the penological interest; (2) whether there are alternative means of exercising the asserted Constitutional right that remains open to inmates; (3) whether and the extent to which accommodation of the asserted right impacts prison staff, other inmates, and prison resources; and (4) the absence of any ready alternatives. *Id.*

Following an analysis of these factors, the *Turner* Court upheld the prison regulation governing correspondence between inmates, but struck down the regulation restricting inmate marriages. Although the standards announced by the Court in *Turner* seem straightforward, questions persist with respect to the application of those standards to situations where a prison regulation impacts not just the rights of inmates, but also, as here, curtails the Constitutional rights of non-prisoners.

Applying the *Turner* reasonableness standard, the Court in *Thornburgh v. Abbott*, 490 U.S. 401 (1989) determined that prison regulations which prevented inmates from receiving specific publications were valid because they protected prison security, were neutral with regard to the content of the expression regulated, were rationally related to security interests and alternative means of expression remained open to the inmates. The Court indicated that it was simply not "sufficient to focus" on whether the rights that were affected were those of prisoners or non-prisoners, *id.* at 410 n.9, and concluded that that the heightened scrutiny test announced in *Martinez* applied only to *outgoing* correspondence from prisoners, *id.* at 413. Although the Court specifically overruled that portion of the *Martinez* holding that distinguished between incoming correspondence from prisoners versus from nonprisoners, *id.* at 414, the *Thornburgh* decision did not abandon the need to consider nonprisoner rights.

In this case, respondent determined that petitioner should not be allowed to mail a DNA semen sample outside prison walls for purposes of artificially inseminating his wife. This decision was summarily made by the warden. It was upheld by the Ninth Circuit without any showing by the warden that the decision bore any logical relationship to penological interests, as the Court required in *Turner*. The

Ninth Circuit's holding is also contrary to the requirement pronounced in *Martinez*, and still valid under *Thornburgh*, that limitations on an inmate's outgoing mail be subjected to heightened scrutiny.

Had the Ninth Circuit undertaken an analysis under either *Turner* or *Martinez*, it would have been obvious that the warden's decision could not be sustained:

- First, California, along with more than two dozen other jurisdictions, has enacted legislation that permits inmates, post-conviction, access to DNA testing for purposes of challenging their conviction. *See* Cal. Penal Code § 1405 (2002);[5]

- Second, unlike some jurisdictions, California's post-conviction DNA testing statute does not mandate the use of state labs for the DNA testing.

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[5] *See also* Ariz. Rev. Stat. 13-4240 (2002); Ark. Code Ann. 16-112-124 to -129 (Michie 2001); Del. Code Ann. tit. 11, 4504 (2001); D.C. Code Ann. 4031-4035 (2001 & Supp. 2002); Fla. Stat. ch. 925.11(1)(a) (2001); Idaho Code 19-2719 (Michie 2002)(procedures for capital cases only); Idaho Code 19-4902 (Michie 2002); 725 Ill. Comp. Stat. 5/116-3 (2002); Ind. Code 35-38-7-1 to -19 (2001); La. Code Crim. Proc. Ann. art. 926.1 (2002); Me. Rev. Stat. Ann. tit. 15, 2137 (West 2001); Md. Code Ann., Crim. Proc. 8-201 (2001); Mich. Comp. Laws 770.16 (2002); Minn. Stat. 590.01 (2002); Mo. Rev. Stat. 547.035 (2002); Neb. Rev. Stat. 29-4117 to -4125 (2001); N.J. Stat. Ann. 2A:84A-32a (West 2002); N.M. Stat. Ann. 31-1A-1 (Michie 2001); N.Y. Crim. Proc. Law 440.30 (Consol. 2001); N.C. Gen. Stat. 15A-269 (2002); Okla. Stat. tit. 22, 1371, 1371.1 (2002); Okla. Stat. tit. 22, 1372 (2001); S.B. 667, 2001 Leg., 71st Sess. (Or. 2001); Tenn. Code Ann. 40-30-401 to -413 (2002); Tex. Code Ann. Crim. Proc. art. 64.03 (2002); Utah Code Ann. 78-35a-301 to -304 (2001); Va. Code Ann. 19.2-327.1 (2001); Wash. Rev. Code 10.73.170 (2002); Wisc. Stat. 974.07 (2002).

California's statutory scheme contemplates the parties (*i.e.*, the state and the prisoner) will use a private lab for such testing. *See* Cal. Penal Code § 1405(g); and

- Third, California has a statutory scheme by which its prison system collects materials that contain DNA samples from inmates, including blood samples, to allow for expeditious detection and prosecution of criminals, as well as to exclude suspects under investigation. *See* DNA and Forensic Identification Data Base and Data Bank Act of 1998, Cal. Penal Code § 295 *et seq.* (2002).

California's legislature has determined that convicted inmates can undergo DNA testing – both for purposes of obtaining exculpatory evidence to fight a conviction, and in order to provide forensic identification data for criminal investigations. The state prison wardens have no say in permitting or denying such testing because, obviously, under a *Turner* analysis, the DNA testing has no bearing on penological interests. As with DNA testing permitted under Cal. Penal Code § 1405, the DNA sample in this instance would be mailed out of the prison. Under *Martinez* and *Thornburgh*, the warden's denial of petitioner's outgoing mail cannot withstand heightened scrutiny review: If a California prison is able to mail or ship DNA samples to a private lab in connection with a Penal Code § 1405 Motion for DNA Testing, it can likewise mail a DNA sample to a lab for artificial insemination – the use of the DNA sample outside the prison walls is certainly of no concern to the warden and does not impact prison security.

C. An Inmate's Spouse's Constitutional Right To Procreate Should Be One Of The Factors Considered In A *Turner* Analysis

Certiorari should be granted pursuant to Rule 10(a) because the Ninth Circuit's decision in *Gerber v. Hickman*, 291 F.3d 617 (9th Cir. 2002), as to whether a person's right to procreate survives incarceration, is in conflict with the decision of the Third Circuit in *Monmouth County Correctional Institution Inmates v. Lanzarro*, 834 F.2d 326 (3d Cir. 1987). Moreover, the Eighth Circuit's holding in *Goodwin v. Turner*, 908 F.2d 1395 (8th Cir. 1990) assumed, without deciding, that procreation survives incarceration.

Amicus will not discuss in detail the conflict between the Ninth Circuit decision and the holding of the Third Circuit in *Monmouth County*. That issue has been addressed in petitioner's brief. However, Amicus will address how the Court could resolve this conflict, while providing guidance on the issue of prison regulations that impact the rights of non-prisoners, based on the Court's own precedent.

Following the Court's decision in *Thornburgh*, lower courts have dismissed, as irrelevant, the rights of nonprisoners impacted by prison regulations.[6] And, the Ninth Circuit majority, in the present case, did not even address nonprisoner rights in its decision to deny petitioner the right to procreate.

In his dissenting opinion in *Gerber*, Judge Kozinski acknowledged that the rights of non-inmate third parties

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[6] In *Goodwin v. Turner*, 908 F.2d 1395, 1399 (8th Cir. 1990), the Eighth Circuit denied an inmate's request to artificially inseminate his wife. The court determined that prison regulations cannot be subjected to strict scrutiny when a family member is affected by a prison regulation.

must to be taken into account in determining the constitutionality of a prison regulation that infringes on a nonprisoner's right to procreate:

> ...[P]rocreation (at least within the marital relationship) is a fundamental right. Such a right may be abrogated only pursuant to lawful authority and for compelling reasons. The reasons here must be particularly strong because the burden of this prohibition falls not only on Gerber, but also Mrs. Gerber, who is precluded from bearing a child fathered by her husband. As the Supreme Court noted in *Turner*, *when a prison regulation creates a "consequential restriction on the [constitutional] rights of those who are not prisoners," it will be subjected to more searching scrutiny than when the burden falls only on inmates.* *Gerber v. Hickman*, 291 F.3d at 631 (citations omitted) (emphasis added).

Judge McMillian noted in his dissent in *Goodwin* that the rights of an inmate's spouse should be considered in applying the *Turner* reasonableness test. Specifically, he recommended that the alternative means available to a non-prisoner for exercising a right also be considered:

> Although the second *Turner* factor focuses on the nature of the deprivation of the inmate's right, I believe it is also appropriate to consider the deprivation of the rights of noninmates...Mrs. Goodwin's fundamental right to procreate within a marriage relationship is completely foreclosed by the Bureau's policy, at least until Goodwin's release from prison. *Goodwin v. Turner*, 908 F.2d at 1406 n.6.[7]

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[7] Unlike Goodwin, Mr. Gerber is never going to be released from prison as a result of his one hundred years to life plus eleven years prison sentence.

To provide further guidance to the lower courts and to resolve the conflict among the courts of appeals, in those instances when a prison regulation impacts the Constitutional rights of non-inmates, the Court is respectfully requested, to affirm that a consideration of the regulation's impact on the Constitutional rights of such third parties is appropriate.

D. An Inmate's Right To Procreate By Means Of Artificial Insemination Is Not Inconsistent With His Status As A Prisoner

The Ninth Circuit's erroneous decision has far greater implications than on just the parties to this case. Whether an inmate's right to procreate is consistent with his status as a prisoner is a decision that, potentially, will impact more than 52,000 married prisoners confined in the penal systems of the states that are subject to the jurisdiction of the Ninth Circuit Court of Appeals.[8] This is not an isolated issue that solely impacts Mr. Gerber's Constitutional rights; the Ninth Circuit decision has a direct ramification on the Constitutional rights of the thousands of married inmates, and their spouses, living in California.[9] Because the Ninth Circuit's rationale in support of its decision is in direct conflict with the Court's precedent in *Turner v. Safley*, 482

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[8] More than 243,000 inmates are confined in prisons within the Ninth Circuit. *See* P. M. Harrison and A. J. Beck, *Prisoners in 2001*, Bulletin of the Bureau of Justice Statistics, U.S. Dept. of Justice, Table 3 at 3 (July 2002), available online at www.ojp.usdoj.gov/bjs/ (hereinafter referred to as "Prisoners in 2001"). The prisoner statistics for the Ninth Circuit do not include figures for the Territory of Guam or the Commonwealth of the Northern Mariana Islands. Since 23% of inmates are married, approximately 52,000 inmates housed in prisons within the Ninth Circuit should be married. *See* Incarcerated Parents, fn. 3, *supra*.

[9] *See* Incarcerated Parents (twenty-three percent (23%) of the inmates in state prison systems are married), fn. 3, *supra*.

U.S. 78 (1987), redress by grant of certiorari is warranted under Rule 10(c). *See, e.g., Lambert v. Wiklund*, 520 U.S. 292, 293 (1997) (certiorari granted "because the Ninth Circuit's holding is in direct conflict with our precedents.") *See also* Stern & Gressman § 4.5 at 232-233.

In *Turner v. Safley*, 482 U.S. 78 (1987), this Court established a two-prong test to consider the impact of prison regulations on prisoners' Constitutional rights. The Court held that "a prison inmate 'retains those [constitutional] rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the correction system.' " *Id.* at 95, citing *Pell v. Procunier*, 417 U.S. 817, 822 (1974). The Court then explained the standards to be applied to each prong of this two-part test.

With respect to the first-prong, whether a prisoner's constitutional rights are "inconsistent with his status as a prisoner," the inquiry is whether the right at issue is "unaffected by the fact of confinement or the pursuit of legitimate corrections goals." *Turner*, 482 U.S. at 96. In other words, the lower courts had to assess whether sufficient "elements" or "incidents" of a prisoner's Constitutional rights survived incarceration. *Id.*

Instead of adhering to the Court's precedent in *Turner*, the Ninth Circuit held that the right to procreate is inconsistent with incarceration based on a different standard: "[C]onsideration of the nature and goals of the correctional system, including isolating prisoners, deterring crime, punishing offenders, and providing rehabilitation." *Gerber v. Hickman*, 291 F.3d at 622. The Ninth Circuit's adoption of this subjective new standard is at odds with the Court's *Turner* decision. Under the guise of "the nature and goals of the correctional system," the Ninth Circuit imposes no limits on the denial of prisoners' fundamental Constitutional rights,

save, perhaps, violations of the Eighth Amendment prohibition against cruel and unusual punishment. The Ninth Circuit was not at liberty to ignore this Court's precedent and to establish a different and subjective standard which creates a nearly irrebuttable presumption that would uphold prison regulations in violation of an inmate's Constitutional rights.

As stated by J. Tashima, writing for the dissent in *Gerber v. Hickman*, 291 F.3d 617 (2002):

> The majority cites the "nature and goals of a prison system," but fails to identify even one way in which accommodating Gerber's request would be inconsistent with the legitimate needs of prison facilities. *Id.* at 626.

Although J. Kozinski joined in J. Tashima's dissent, he further elaborated on this point in his dissent:

> The majority hinges its opinion on the proposition that "the right to procreate is fundamentally inconsistent with incarceration," Maj. Op. At 7584, but does not explain how. *Id.* at 629.
>
> Is procreation one of those rights the exercise of which is inconsistent with the prisoner's loss of his freedom of locomotion? Apparently not, at least as Gerber proposes to exercise it. Gerber is not asking to go home for a conjugal visit, not to enjoy such a visit within the prison; *he does not seek to loosen the strictures of his confinement in the least.* Gerber asks only to engage in activities that prisoners are already free to engage in (see steps 1-3 above). That these activities [ejaculating into a plastic cup to be mailed from the prison] might result in the creation of

> a life outside prison walls is no more inconsistent with Gerber's status as a prisoner than is any other consequence of mailing materials from prison to the outside world. *Id.* at 630 (emphasis added).

Had a factual inquiry been conducted under *Turner*, it would have become apparent that various aspects of petitioner's right to procreate are "unaffected" by his confinement. For example, petitioner's ability to have a child with his wife (i) is a reaffirmance of, and exercise of, his and his wife's Christian faith, (ii) would provide emotional support and love to petitioner over the long-term of his confinement, and (iii) would demonstrate petitioner's personal commitment and dedication to his wife and family. These attributes survive incarceration and in fact should contribute to stability within the penal system.

There is nothing on the record, in connection with respondent's Fed. R. Civ. P. 12 motion to dismiss, that allowed the Ninth Circuit to conclude, as a matter of law, that petitioner's fundamental right to procreate does not survive incarceration, especially by means of artificial insemination through the use of outgoing mail from the prison. At the very least, the Ninth Circuit should have considered whether there are "incidents" of the right to procreate which are "unaffected" by the fact of petitioner's confinement "or the pursuit of legitimate corrections goals" and whether "these remaining elements form a constitutionally protected [right] in the prison context." *Turner,* 482 U.S. at 96. That is the analysis the Court engaged in with respect to the marriage regulation which was at issue in *Turner*, and that is the same factual inquiry which the lower courts were required to undertake in this instance.

Alternatively, *amicus* respectfully asks the Court to further instruct the lower courts with regard to the factors

that must be considered in determining whether a prisoner's constitutional rights are "unaffected" by incarceration or are "inconsistent" with his status as a prisoner.

II. Fundamental Notions Of Due Process Confirm That, In California, Incarceration Does Not Terminate The Constitutional Right To Procreate.

Certiorari is appropriate under Rule 10(c) because the Ninth Circuit's decision is contrary to precedent of this Court, which holds that procreation, within the marital relationship, is a fundamental right. *See Griswold v. Connecticut*, 381 U.S. 479 (1965). Moreover, the Ninth Circuit's ruling is clearly erroneous and violates fundamental rights available to petitioner, and to thousands of other prisoners, under California's Constitution. Therefore, certiorari is also appropriate pursuant to the Rules of Decision Act, 28 U.S.C. § 1652.[10]

In his dissenting opinion, Judge Kozinski noted that the warden's decision could not be sustained because it violates notions of due process – after all, the California Department of Corrections allows conjugal visits and "some of these visits will result in procreation." *Gerber v. Hickman*, 291 F.3d at 631. Judge Kozinski also pointed out that there was no evidence of any legislative intent to cut-off an inmate's right to procreate. *Id.* Judge Kozinski was absolutely correct.

"The power to deprive a prisoner of his civil rights and to restore them is one that resides in the Legislature." 15 Cal. Att. Gen. Ops. 38 (1950), citing *Calif. Highway Comm. v. Indus. Acc. Comm.*, 200 Cal. 44, 48, 251 P. 808 (1926) (legislative intent was to provide certain limited civil

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[10] *See Frisby v. Schultz*, 487 U.S. 474, 482 (1988); Stern & Gressman § 4.10 at 242-243.

rights to inmates engaged in work program). In fact when California's Legislature initially enacted Cal. Penal Code § 2600 (hereinafter "Section 2600"), the provision became known as "the civil death doctrine" because it deprived inmates of most fundamental rights.

As a result of the 1975 revisions to Section 2600, prisoners in California could "be deprived of such rights, and only such rights, as is necessary in order to provide for the reasonable security of the institution in which he is confined and for the reasonable protection of the public." The term "rights" under Section 2600 was defined by the California Supreme Court to mean those rights afforded to non-confined individuals residing in California. *DeLancie v. Superior Court*, 31 Cal. 3d 865, 868, 647 P.2d 142, 183 Cal. Rptr. 866 (1982), *overruled on other grounds*, *People v. Loyd*, 27 Cal. 4th 997, 45 P.3d 296, 119 Cal. Rptr. 2d 360 (2002). And, the California Supreme Court in *In re Arias*, 42 Cal. 3d 667, 690-691, 725 P.2d 664, 678 230 Cal. Rptr. 505, 519 (1986) confirmed that the "rights" at issue under Section 2600 "must begin with a discussion of the rights of non confined citizens." In *rejecting* the notion that "rights" under Section 2600 are "circumscribed by cases that define prisoners' rights under the federal Constitution," the California Supreme Court stated: "This is not a proper approach for analyzing claims under that statute." *Id.* at 690, 725 P.2d at 678, 230 Cal. Rptr at 518. And, the right to procreate is not only protected by the First and Fourteenth Amendments to the United States Constitution, it is also protected under the California Constitution. *See Conservatorship of Valerie N.*, 40 Cal. 3d 143, 161, 707 P.2d 760, 219 Cal. Rptr. 387 (1985).

California's Legislature further amended Section 2600 in 1994. The provision now uses language identical to the second-prong of the *Turner* test and states that a prisoner

may be deprived of such rights "as is reasonably related to legitimate penological interests." Although a factual inquiry under the second-prong of the *Turner* test must be conducted to determine if a regulation "is reasonably related to legitimate penological interests," the express language of Section 2600, and the California Supreme Court's ruling in *Thompson v. Department of Corrections*, 25 Cal. 4th 117, 130, 18 P.3d 1198, 105 Cal. Rptr. 2d 46 (2001), left unchanged the preliminary inquiry under Section 2600: "Rights" afforded to prisoners are the same ones which are possessed by non-confined residents of California.

The Ninth Circuit failed to take account of the California Supreme Court decisions in *DeLancie*, *In re Arias* and *Conservatorship of Valerie N.* which establish that Mr. Gerber has a fundamental right to procreate under the California Constitution. There is no predicate determination of whether a constitutional "right" survives incarceration under California law. The Ninth Circuit's ruling in this regard conflicts with the pronouncement of the state of California's highest court with respect to the meaning of "rights" under Section 2600.

Because Mr. Gerber and all other prisoners residing in California are presumed to have the same rights as non-incarcerated individuals, the Ninth Circuit could not, as a matter of law, determine that the right to procreate does not survive incarceration. The Ninth Circuit committed clear error, and this Court should grant certiorari to correct this error which will impact the state Constitutional rights of thousands of prisoners confined in the California state prison system.

CONCLUSION

An inmate's right to procreate, by means of artificial insemination outside prison walls, has no bearing on penological interests. An inmate's ability to maintain and strengthen family bonds by having children with his wife can ultimately make the inmate's confinement easier for his jailers. Without rationale reason, the state should not have the ability to deprive any individual of the fundamental right to have children. In this case, that decision also flies in the face of the dangers perceived by this Court in *Skinner* with respect to race control. The Tribe respectfully urges the Court to grant certiorari and to reverse the Ninth Circuit majority decision.

Dated: October 17, 2002 Respectfully submitted,

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